

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of Southern Missouri Gas Company,)
L.P.'s Purchased Gas Adjustment Factors to be) Case No. GR-2006-0352
Reviewed In Its 2005-2006 Actual Cost Adjustment.)

**RESPONSE IN OPPOSITION
TO STAFF'S MOTION IN LIMINE**

COMES NOW Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas ("SMNG") and, pursuant to 4 CSR 240-2.080(15), submits its Response in Opposition To Staff's Motion in Limine as follows:

1. On November 1, 2007, the Staff of the Missouri Public Service Commission ("Staff") filed its pleading titled "Motion In Limine," wherein it sets forth "its Objections to the Rebuttal Testimony of Randal T. Maffett." In its Motion, Staff proceeds to list, in numbered paragraphs, its objections to specific lines of Mr. Maffett's prefiled Rebuttal Testimony, and states the purported bases for such objections. Staff requests that the Commission "issue an Order allowing any party who wishes to respond to these objections to do so no later than ten days after the filing of this Motion in Limine," and "Staff further requests that the Commission rule on the objections and responses prior to the hearing scheduled on November 29, 2007." (Motion, p. 5.) While no Order has been forthcoming, lest no response be deemed acquiescence SMNG is compelled to file this response in opposition to Staff's Motion and the relief requested therein. SMNG also requests the opportunity to present oral argument on these procedural issues during the evidentiary hearing scheduled for November 29, 2007.

2. Whereas a number of Staff's paragraphs contain the same basic objection and "supporting" rationale, SMNG will respond to Paragraphs 2, 3, 5, 6, 7, 8, 9, 11, 12

and 13 of Staff's Motion collectively. Staff opines that certain lines of Mr. Maffett's prefiled rebuttal testimony "contain impermissible opinions about the credibility of another witness by an expert witness," and "this testimony invades the province of the fact-finder by impermissibly seeking to undermine the credibility of Dr. Choe." In support of its objections, Staff cites two criminal cases that clearly are not on point with respect to the applicable circumstances, rules and procedures in this proceeding, and the third case actually supports the inclusion of expert testimony in situations such as those presented herein.

First, Commission Rule 4 CSR 240-2.130 Evidence, and conforming orders implementing its provisions, clearly contemplate the prefiling of direct, rebuttal and surrebuttal testimony and, indeed, "rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case." 4 CSR 240-2.130(7)(B). Mr. Maffett's rebuttal testimony addresses the shortcomings and failures of Mr. Choe's analyses set forth in Choe's prefiled direct testimony, a very technical area in which Mr. Maffett has substantial expertise. (SMNG is pleased that Staff concedes that Mr. Maffett is, indeed, an expert in this area, which is readily apparent by a cursory review of his direct testimony and supporting professional qualifications. As noted above, Staff's objection claims Mr. Maffett's testimony "contain impermissible opinions about the credibility of another witness by an expert witness, . . ." (emphasis added).) Obviously, one only has to briefly examine the rebuttal testimony of Mr. Choe to find that it is replete with similar "opinions": "Mr. Maffett's explanation looks at only a portion of the whole picture" (p. 2); "Mr. Maffett again tells only a part of the whole story." (*Id.*)

Second, Missouri law provides that:

(1) In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. (2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Mo. Rev. Stat. §490.065 (2000).)

The Missouri Supreme Court has held that this statute “guide[s] the admission of expert testimony in Missouri administrative proceedings.¹ The essential test of expert opinion evidence is whether it will be helpful to the fact finder.²

Third, the cases cited by Staff in support of its objections are not on point and merely address a criminal per se exclusionary rule for expert testimony regarding the credibility of eyewitness identifications. In the *Whitmill* and *Lawhorn* cases, the Court discusses a situation where a party would have offered expert testimony as to alleged difficulties of cross-racial identifications. The Court held that “such matters are within the general realm of common experience by members of the jury and can be evaluated without an expert’s assistance.” Such is a far cry from the complexities and various pricing structures, mechanisms and instruments utilized for cost-effective management of price and/or usage volatility as addressed by the witnesses in this proceeding. In fact, the *Peterson* case cited by the Staff, holds that “expert’s testimony is admissible on those subjects about which the jury lacks experience or knowledge and which will assist the jury, unless it necessarily diverts the jury’s attention from the relevant issues.” In that case, the owner’s expert did not improperly comment on plaintiff driver’s credibility by

¹ *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003).

² *Fierstein V. DePpaul Health Center*, 24 S.W.3d 220 (Mo.App.E.Dist. 2000).

testifying as to how fast the trucks would have been going and where they would have been placed assuming the facts stated by the parties were true.

Mr. Maffett's expert analysis and rebuttal of Mr. Choe's direct testimony is absolutely proper and will be helpful to the fact-finder in this proceeding, the Commission.

3. Paragraphs 1, 4 and 15 of Staff's Motion object to portions of Mr. Maffett's rebuttal testimony on the basis that the portion of the answer purportedly contains a legal conclusion that the witness is not competent to render. In Commission proceedings, it is common for expert witnesses to express their understanding of the statutes and case law dealing with public utility regulation. However, in the passages objected to by Staff in Paragraphs 1, 4, and 15, Mr. Maffett is not expressing a legal conclusion, but instead is giving his opinion regarding the ultimate issues to be decided by the trier of fact in this case—Whether SMNG acted imprudently in its gas purchasing and/or hedging decisions, under the circumstances that were known at the time of the decisions, and whether a disallowance of gas costs is appropriate. As Section 490.065(2), RSMo 2000, *supra*, provides: Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (*emphasis added*).

4. Paragraphs 14 and 15 of Staff's Motion object to portions of the testimony on the basis that the statement "contains an impermissible opinion about the ultimate issue to be decided by the Commission." As Section 490.065(2), RSMo 2000, *supra*, provides: Testimony by such an expert witness in the form of an opinion or inference

otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

5. Paragraph 10 of the Staff's Motion objects to certain lines of the rebuttal testimony on the basis that "these lines mischaracterize the testimony of Dr. Choe." SMNG strongly disagrees with this allegation, and Staff certainly will have the opportunity to cross-examine Mr. Maffett on such point should it wish to do so. The testimony will speak for itself, and the Commission can make the appropriate determination.

6. Finally, as this Commission is well aware, Section 386.410.1, RSMo 2000, provides that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence."

WHEREFORE, SMNG, expressly reserving its right to further respond at hearing and requesting oral argument on these particular matters, states herein its opposition to the Staff's Motion in Limine and the specific relief requested therein, and respectfully submits that said Motion should be denied.

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 emailed, mailed or hand-delivered, this 8th day of November, 2007, to:

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