

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       )

**MOTION OF MISSOURI GAS ENERGY, A DIVISION OF  
OF SOUTHERN UNION COMPANY, TO STRIKE THE  
SURREBUTTAL TESTIMONY OF JOHN A. TUCK**

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Missouri Gas Energy, a division of Southern Union Company (MGE), hereby moves for an order striking the surrebuttal testimony of John A. Tuck (“Tuck”), which has been offered by the Office Public Counsel (“OPC”), and in support of its motion states the following:

**I. Tuck’s Surrebuttal Testimony Is An Impermissible Effort To Offer New Direct And Rebuttal Testimony In This Proceeding**

The Commission’s rule for submitted testimony, which appears at 4 CSR 240-2.130(7), states that surrebuttal testimony “shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.” Although Tuck – a former employee of the OPC who has not testified in a rate case since 1995 – purports to offer “surrebuttal” testimony to John Dunn’s (“Dunn’s”) rebuttal of OPC witness Travis Allen (“Allen”), even a cursory review of his testimony demonstrates that Tuck is attempting to interject new direct and rebuttal testimony in this action.

The OPC – apparently aware of the lack of expertise of its own rate of return witness, Allen<sup>1</sup> – wants to use Tuck’s surrebuttal testimony to create a new OPC rate of return expert. Indeed, despite the fact that Tuck occasionally mentions Allen or Dunn, his testimony is filled with long, unsubstantiated discussions that are unrelated to Dunn’s rebuttal of Allen. For example:

- At pages 6-10 of his “surrebuttal” testimony, Tuck addresses capital structure issues raised in Dunn’s *direct* (not rebuttal) testimony and Allen’s rebuttal testimony. As part of this discussion, Tuck discusses at length his agreement with Allen’s “hypothetical

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<sup>1</sup> MGE is simultaneously filing a motion to strike Allen’s testimony given, among other things, Allen’s complete lack of expertise in his field of testimony. Allen has conceded that his entire experience with utility finance and rate of return analysis *was his one month of employment with the OPC prior to submitting his direct testimony in this action*. Part of his purported “training” during this one month was having occasional conversations with Tuck. The OPC is now trying to interject Tuck into this proceeding, to replace or supplement his ill-experienced student. (See Memorandum of Law of Missouri Gas Energy, a Division of Southern Union Company, in Support of its Motion to Exclude Certain Testimony and Opinions of Travis Allen, dated June 18, 2004 (“MGE Mem.”), filed contemporaneously herewith.)

capital structure” – a structure that appears for the first time in Allen’s rebuttal testimony *and is never mentioned in Dunn’s rebuttal*;

- At pages 12-21 of his “surrebuttal” testimony, Tuck engages in a lecture about the capital structure set forth in Dunn’s *direct* testimony and his views on capital structure in general. Throughout this discourse – which contains virtually no authoritative support and is based to a large extent on Tuck’s blatant speculation about “increased risks” to Missouri ratepayers<sup>2</sup> – *Tuck mentions Dunn’s rebuttal only twice*, on pages 14 and 15, and long discussions proceed without any real link to Dunn’s rebuttal testimony. Clearly, the OPC wants to submit the direct, albeit completely unsubstantiated, testimony of Tuck on what the Commission should do regarding MGE’s capital structure at this late stage in the process. Surrebuttal testimony, however, is not the appropriate vehicle for doing so; and

- At pages 24-37 of his “surrebuttal” testimony, Tuck engages in a transparent effort to provide direct testimony supporting Allen’s direct testimony and rebutting Dunn’s *direct* testimony with regard to DCF analyses. In this section, Tuck’s testimony includes ruminations on what he feels is the appropriate approach to DCF calculations, and several references to Dunn’s direct testimony, but not even a hint of a tie to Dunn’s rebuttal of Allen. As part of these ruminations, Tuck asserts his opinions on “drawbacks associated with sole reliance on analysts’ projected earnings growth rate, a purportedly “better way to assess future growth,” how a “professional analyst” places

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<sup>2</sup> Not surprisingly, Allen has adopted the very same speculation in his surrebuttal and deposition testimony, and MGE demonstrates the baselessness of this speculation in its memorandum of law in support of its motion to exclude Allen’s testimony. (*See* MGE Mem. at 7-10.) Like Allen, Tuck speculates about “risks” that Missouri ratepayers may face because of Panhandle, and ultimately makes recommendations that would result in a significant reduction in MGE’s allowed rate of return for these purported “risks,” but does absolutely no analysis of Southern Union, Panhandle, MGE or their respective business plans in offering this testimony.

“emphasis on the product of the retention rate and return on equity” and the fact that “some cost of capital analysts argue” that “the retention growth rate is flawed because it is circular.” Although it is MGE’s position that these are unsubstantiated assertions from a witness little more qualified than Allen, if the OPC wanted to submit Tuck’s direct testimony in this proceeding, it was required to do so by April 15, 2004.

This new direct testimony violates the Commission, Order Adopting Procedural Schedule of Dec. 18, 2003; violates 4 CSR 240-2.130 concerning direct testimony; and prejudices MGE in that it raises the need for filing further rebuttal testimony even though the hearing in this proceeding is only one business day away. *See e.g., United States v. Sadler*, 488 U.S. 434, 435 (5<sup>th</sup> Cir.) (“Prejudice occurs . . . if the . . . witness goes beyond rebuttal and injects fresh issues on which the defendant is denied the right to present evidence”), *cert. denied*, 417 U.S. 931 (1974). Although MGE submits that Tuck is decidedly wrong in his opinions, MGE should not be burdened with this last minute testimony when the OPC had months to prepare it and submit it on direct.

## **II. Tuck’s Attempts To Offer Surrebuttal Testimony To A Witness That Did Not Even Rebut Allen**

As a general matter, it is entirely inappropriate for Tuck to offer OPC surrebuttal testimony with respect to Dr. Roger A. Morin, a MGE witness that rebutted only the testimony of Commission Staff witness David Murray. Further, in this purported “surrebuttal” testimony, Tuck launches into what are clearly efforts to submit additional direct testimony, such as at pages 40-42, where Tuck offers a number of unsubstantiated opinions about “differences” in returns on equity and “required” and “actual or projected” returns on equity that are not linked in any real way to rebuttal testimony.

### Conclusion

For the foregoing reasons, MGE respectfully submits that the Commission should strike the surrebuttal testimony of OPC witness John A. Tuck on the ground that it violates 4 CSR 240-2.130(7) and impermissibly seeks to offer direct and rebuttal testimony in this proceeding. MGE reserves its right to object to Tuck's testimony on other grounds.

Dated: June 18, 2004

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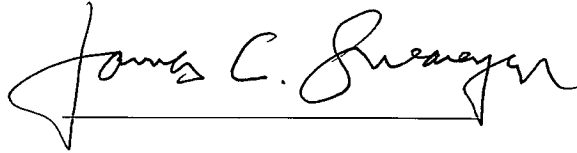


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ATTORNEYS FOR MISSOURI GAS ENERGY

**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 18<sup>TH</sup> day of June, 2004, to all parties of record.

A handwritten signature in black ink, reading "James C. Swenager". The signature is written in a cursive style with a horizontal line underneath the name.