

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

In the Matter of Missouri Gas Energy and)
Its Tariff Filing to Implement a General)
Rate Increase for Natural Gas Service)

Case No. GR-2009-0355

**STAFF’S RESPONSE TO COMMISSION ORDER
TO RESPOND TO MISSOURI GAS ENERGY’S OBJECTIONS TO A REQUEST THAT
THE COMMISSION TAKE OFFICIAL NOTICE OF CERTAIN MATTERS AND TO
THE ADMISSION OF PAGES 2 AND 3 OF STAFF’S EXHIBIT 103**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and files its Response to Commission Order To Respond to Missouri Gas Energy’s Objections to a Request that the Commission Take Official Notice of Certain Matters and to the Admission of Pages 2 and 3 of Staff’s Exhibit 103 (Response). In support of its Response Staff states:

1. On October 26, 2009, during the hearing in this matter, the Public Counsel (OPC) asked the Commission to take official notice of the customer comment cards which have been filed in this case.

2. On November 3, Missouri Gas Energy (MGE) filed its objections not only to OPC’s Request the Commission take official notice of the comment cards, but MGE also objected to the admission of pages 2 and 3 of Staff’s Exhibit 103.

3. The Commission has a long history of maintaining a “Letter File” with rate case filings at the Commission.

4. In this case, the file is part of the rate case in EFIS, and is available to all parties for review, but is not available to the public in general, and have been designated by the Commission as highly confidential because the comments include confidential customer information such as account numbers.

5. While the Commission may take official notice of its own records, as may courts, in this case, Staff recommends, the Commission take official notice of the number of customer comment cards filed, which is easily verifiable in the Commission's official file, but not rely on the comments themselves in making its decision

6. Courts may take notice of their own records, and the Commission may also take notice of its records. An administrative body may take official notice of the same matters of which the courts may take judicial notice, and the Commission may determine for itself whether or not to exercise the power. §536.070 RSMo (2000 as currently supplemented). In this case, however, the actual number of comments is easily verifiable and the Commission may take notice of that fact. In addition, the Commission received testimony as to the actual number of comment cards.

7. According to Missouri Practice, "whether a Missouri court takes judicial notice has been said to depend on the nature of the subject, the issue involved, and the justice of the case. 22 Mo. Prac., Missouri Evidence § 201.2 (3d ed.) *Carr v. Grimes*, 852 S.W.2d 345, 351 (Mo.App.1993). "[T]he doctrine of judicial notice is not a hard and fast one, but is modified by a judicial discretion which leaves it generally to the court to determine for itself whether it shall exercise the power in a given instance, depending primarily upon the nature of the subject, the issues involved, and the apparent justice of the case."

8. The larger question is whether the Commission may take notice of and rely on the actual comments in the comment cards in making its decision.

9. MGE has objected to the contents of the comment cards as hearsay. Missouri courts have defined hearsay in various ways. One definition is an "out-of-court statement used [offered] to prove the truth of the matter asserted." Missouri courts have held that a written

statement made out of court is hearsay if it otherwise fits the definition of hearsay. *Venator v. Venator*, 512 S.W.2d 451, 454–55 (Mo. Ct. App. 1974) (“extra-judicial statements of third persons contained in letters and offered in evidence to prove the truth of the matters therein asserted must be excluded under the hearsay rule.”)

10. To the extent that OPC offered the cards for the truth of the matters asserted by the commenters, Staff recommends the Commission rely on other evidence in making its decision.

11. The Commission may rely on comments made at the public hearings in which the witnesses are under oath and subject to cross examination.

12. The Commission may admit the chart into evidence, although the testimony of Ms. Gay Fred provides the same information to the Commission. Ms. Gay Fred, head of the Commission’s Consumer Services Department, testified as an expert before the Commission and was subject, at that time, to the full array of cross-examination. Moreover, during her testimony, no one objected to her credentials as an expert in consumer services. *See Lee v. Hiler*, 141 S.W.3d 517, 524 (Mo. Ct. App. 2004).

13. Ms. Fred testified as to the number of customer comments received in this case, to the process for receiving and entering the comments into the Commission’s Electronic Filing and Information System (EFIS), to the number of comments she had read, as well as to her expert evaluation of the comments. (The transcript is not yet available for citation.). Even if Ms. Fred’s expert evaluation of the comments is based upon evidence which would not be independently admissible (i.e. hearsay), courts have held expert testimony admissible if subject to cross-examination. *See Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo. Ct. App. 2007). More specifically, an expert opinion may be based on hearsay as long as it is hearsay that is

“reasonably relied upon by experts in that field...and otherwise reasonably reliable.” *Peterson v. National Carriers, Inc.* 972 S.W.2d 349, 354 (Mo. Ct. App. 1998)(quoting RSMo § 490.065.3).

14. Ms. Fred was subject to cross examination by the parties and the Commission. Staff recommends the Commission rely on her unchallenged testimony as an expert in receiving, processing and evaluating customer comment cards.

WHEREFORE Staff recommends that while the Commission may notice the number of comment cards received, instead of relying on the comments in the cards in making its decision, instead the Commission rely on the testimony of its expert witness, Ms. Fred, and the testimony of sworn witnesses at the public hearing in forming its decision.

Respectfully submitted,

/s/ Lera L. Shemwell

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record the 10th day November, 2009.

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