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	)	Case No. GR – 2009 – 0355
Increase for Natural Gas Service	)	

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT
IN RESPONSE TO ORDER REGARDING CUSTOMER COMMENTS

I dissent in the Commission's ***Order Regarding Customer Comments*** ("Order")[1] because it did not comport to the rules of evidence, deprived parties of their due process rights, stretches the imagination and defies logic. The majority has admitted into the record in this case ***as evidence*** approximately 12,000 individual comment cards,[2] without any party moving for their admission, or having given the parties any opportunity to object, cross examine, conduct *voir dire* as to the proponent, or in any manner test the veracity of the item proffered for admission into the record. First, the cards have been proffered without any notice as to the proponent, or any foundation laid for their consideration. Second, the cards have not been authenticated. Third, the cards represent hearsay evidence, for which no satisfactory exception is available. Fourth, if the cards were offered as "non hearsay" and ***not*** "for the truth of the matter asserted" the cards do not represent relevant evidence.[3] Lastly, no party was given any opportunity to conduct any manner of cross examination, of anyone, from the time the majority's position moved from denying Public Counsel's pending motion that the Commission take official notice of customer comments, and instead moving the comment cards into the record as evidence.

In Case No. EM – 2007 – 0374 I filed a ***Statement Responding to the "Statement in Dissent to Regulatory Law Judges' Evidentiary Ruling and Objections to Procedural***

[1] Issued December 2, 2009 and effective December 12, 2009.
[2] Tr. Vol. 13, p. 807, lns.8 – 9, 10.
[3] See discussion at pgs. 2 – 3 *infra*.

Irregularity" addressing the Presiding Officer's denial into evidence of "anonymous letters" offered by Staff. I incorporate here by reference my statement in that case because I view the comment cards in much the same way I view the anonymous letters; they neither one should be evidence. That is not to imply that the comment cards are not relevant, but relevance for the purposes of admission into the record requires evidence to be both logically and legally relevant in order to be admissible. Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue.[4] Even if logically relevant, the finder of fact has discretion to limit such evidence, or exclude it all together, if the fact-finder believes the evidence is not legally relevant. Legal relevance refers to the probative value of the purported evidence outweighing its risks of unfair prejudice, confusion of issues, delay, waste of time, or cumulativeness.[5] Consequently, even logically relevant evidence may be excluded unless its benefits outweigh its costs.[6] The lack of a discernable proponent of the comments cards, and the fact that the motion and admission of the comment cards was accomplished at a time which prohibited any party from an opportunity to object or even question the logical or legal relevance of the evidence violates a fundamental rule of evidence. The "let it all in and we will sort it out later" approach still is not the legal standard for the admission of evidence in contested cases.

Here I would have fully supported granting the Office of the Public Counsel's ("Public Counsel" or "OPC") motion seeking official notice, thereby allowing the Commission to fully

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[4] ***State v. Liles***, 237 S.W.3d 636, 638 – 639 (Mo . App. 2007); ***Cohen v. Cohen***, 178 S.W.3d 656, 664 (Mo. App. 2005); ***Roorda v. City of Arnold***, 142 S.W.3d 786, 797 (Mo. App. 2004): ***Kendrick v. Bd of Police Cont'rs of Kansas City, Mo.***, 945 S.W.2d 649, 654 – 655 (Mo. App. 1997); ***Gardner v. Missouri State Highway Patrol Superintendent***, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting ***State ex rel. Webster v. Missouri Resource Recovery, Inc.***, 825 S .W.2d 916, 942 (Mo. App. 1992)).

[5] ***State v. Liles***, 237 S.W .3d 636, 638 – 639 (Mo. App. 2007).

[6] ***Id***. Even when evidence is relevant, it is within the discretion of the fact finder to exclude the evidence if its probative value is outweighed by its prejudicial effect. ***Stevinson v. Deffenbaugh Industries, Inc.***, 870 S.W.2d 851, 860 (Mo. App. 1993).

recognize the existence of and number of comments submitted in this case. The Public Counsel, during the evidentiary hearing moved that the Commission take official notice of customer comments.[7] Just because this motion was proffered does not equate official notice as legally synonymous with a motion to admit the cards into evidence in the case. To the extent that the majority infers that the ***Public Counsel's Reply to MGE's Objections Regarding Customer Comments*** moved for the admission of the comment cards into evidence, Public Counsel's filing does not support such a proposition. First, had the Public Counsel intended the cards to become a part of the record in this case, it defies understanding why Public Counsel would provide fervent support for its limited motion for official notice, therefore reading something into Public Counsel's filing that is not there. Any reading by the majority of the Public Counsel's filing to reach a result which could have as easily been raised during the hearings in this case, or by a plain simple motion which included a prayer for the relief which the Public Counsel sought, further demonstrates the mental contortions the majority has taken here.[8]

The majority seems to find comfort in the Public Counsel's representations in paragraph 10 of its reply filing to support the notion that a motion was before the Commission for admission of the comment cards into evidence. Paragraph 10 of Public Counsel's reply does not seek to move anything into evidence, but rather asks that the Commissioners read the "comments." Paragraph 10 of the Public Council's reply states:

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[7] Tr. Vol. 8, p. 95, lns. 9 – 12; as stated by Public Counsel, "I did have one more thing to mention. We had discussed those customer comments. I just wanted to ask the Commission to take **official notice** of those." (Emphasis added).

[8] ***Public Counsel's Reply to MGE Response Regarding Customer Comments***, filed on November 20, 2009 further suggests that the Public Counsel's motion was limited to "**official notice**." Paragraph 1 states:

> On November 11, 2009, OPC replied to MGE's objections and explained that the Commission could grant OPC's motion and take **official notice of the comments** as:
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> - Position statements of MGE's customers under 4 CSR 240-2.040(5);
> - Evidence of official records of the Commission under § 536.070(6) RSMo; and/or
> - Evidence of a survey under § 536.070(11) RSMo.

(Emphasis added). There is nothing that suggests that anything other than "official notice" was ever requested by the Public Counsel with regard to this matter.

> 10. The public trusts that when the Commission solicits comments from the public on a proposed rate increase that those comments will be read by the Commission. **OPC asks that the Commission** be consistent with the Commission's goal of protecting the public interest by **reading the public comments to better understand the public's positions on what is in the public interest**.

Asking this Commission to read the public comments does not support that Public Counsel moved for the admission of the comment cards. My conclusion that the reply filing did not represent such a motion is further supported by the reply's lack of any prayer for relief supporting any alleged motion. In the "wherefore" clause of the reply Public Counsel states that "… the Signatory Parties respectfully offer[s] this ***reply*** to MGE's objections regarding customer comments and Staff Exhibit 103." (Emphasis added). Public Counsel prays for nothing, either specific or general, and most certainly not for admitting the comment cards into evidence. A careful reading of paragraph 10 together with the prayer for relief demonstrates that paragraph 10 is nothing more than a request framed in the form of argument, and was not a motion before the Commission for consideration. To the extent that this Commission relies upon the Public Counsel's reply to support admission of the comment cards into evidence, the majority has exceeded its authority by granting relief which was not requested.

It is well recognized that a court is without authority to enter a judgment which grants relief beyond that which was requested in the petition. ***Colbert v. State, Family Support Div.***, 264 S.W.3d 699 (Mo. Ct. App. W.D. 2008).[9] Where no motion or prayer exists, no relief can be granted. There is an exception to this general rule vested in Courts possessing equitable powers, where the court may grant any relief warranted by pleaded issues whether or not it was specifically included in the prayer for relief, but only when such relief is fully supported by facts

[9] Missouri courts are restrained from deciding an unpleaded factual issue however a court of equity can grant any relief warranted by pleaded issues whether or not it was specifically included in the prayer for relief but only when such relief is fully supported by facts which were either pleaded or tried by consent. ***Feinberg v. Feinberg***, 924 S.W.2d 328, 330 (Mo. Ct. App. 1996).

which were either pleaded or tried by consent. ***Id.*** In this case, the Commission, lacking equitable powers, cannot grant relief where none is specifically or even generally requested by the movant.[10] See ***Report and Order***, ***Ahlstrom Development Corp. v. Empire Dist. Elec. Corp***., 1995 WL 789409 (Mo.P.S.C. Nov 08, 1995) (Case No. EC – 95 – 28).[11]

If the Public Counsel is not the movant, then to the extent that the Commission itself is the movant, the question then turns on the manner in which the motion occurred and the deprivation of the rights of the parties to this case in the advancement and granting of the motion.[12] The motion for the admission into evidence did not occur during an evidentiary hearing where all parties to the contested matter were given an opportunity to be present and participate in the process; rather, this matter was taken up by the Commission during an Agenda meeting, where parties were not provided an opportunity to participate or be heard prior to final Commission action.

By voting on an evidentiary issue, the majority has also disregarded its own rule, 4 CSR 240 – 2.130(3) which provides that "[T]he presiding officer shall rule on the admissibility of all evidence." Here the majority, in disregard for its own rules, voted in favor of an order which ruled on the admissibility of evidence, in direct contravention of the Commission's rule in that the regulatory law judge was the presiding officer in this matter. No Missouri law, read in any

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[10] This Commission, as an administrative tribunal, has no authority to propound or enforce principles of equity. ***State ex rel. Jenkins v. Brown***, 19 S.W.2d 484, 486 (Mo. 1929); ***Bliss v. Lungstras Dyeing and Cleaning Co.***, 130 S.W.2d 1983, 201 (St.L. Ct. App., 1939); and ***Soars v. Soars-Lovelace, Inc.***, 142 S.W.2d 866, 871 (Mo. 1940); See also ***Am. Petroleum Exch. v. Pub. Serv. Comm'n***, 172 S.W.2d 952, 955 (Mo. 1943) "Likewise, the Commission does not have the authority to do equity or grant equitable relief."

[11] The Commission in striking surebuttal testimony stated that "**this testimony represents a request for relief which is clearly at odds with the relief requested in the Complaint.** This testimony goes beyond merely mischaracterizing the relief requested [...]. Rather, this testimony reflects a different request for relief the effect of which would be to fundamentally change the nature of this proceeding from the one framed by [the] Complaint. To allow this evidence to remain in the record would unduly prejudice the positions of parties other than [the complainant]. In addition, the Commission will strike this testimony because it does not respond to rebuttal testimony but merely attempts to inject a new request for relief."

[12] Assuming that the reply of the Public Counsel is the basis for admission of the comment cards into evidence, the same procedural irregularities discussed *infra* also apply.

context, can lawfully strip away the guarantees afforded through due process. Laws such as section 386.410 RSMo do not take away lawful protections, but rather provide the Commission with latitude to operate in an environment that is indicative of its charge as a quasi-judicial body. To the extent the majority wished to move evidence into the record, the proper time and place would have been one which provided notice to all the parties, and provided them with a meaningful opportunity to be heard with regard to the motion.[13]

In this case, there is no doubt that no party was afforded an opportunity to question, conduct *voir dire*, or in any way challenge the motion, regardless of whether it was the Commission or Public Counsel making the proffer. Evidence which is nothing more than a one-way exchange of information and where witnesses are not subject to cross examination by opposing counsel does not generate competent evidence upon which the Commission may base a decision on the merits of any action.[14] The Commission's admission of the comment cards as evidence, into the record in this case, was not only unlawful, but what is most disturbing is that it was accomplished with a disregard for the rights of parties to a contested case.[15]

The Order fails to demonstrate who the proponent was, how the comment cards were legally relevant to this proceeding, their authenticity, and for what purpose they were admitted into the record. The Order does provide a recitation of the positions and arguments of the parties in this matter. The Order also recites wishful evidentiary thinking with regard to evidentiary standards including hearsay, and non-hearsay, all of which is nothing more then dicta, because

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[13] Section 536.070. RSMo "In any contested case: […] (2) Each party **shall have the right** to call and examine witnesses, to introduce exhibits**,** to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, **and to rebut the evidence against him**." (Emphasis added).

[14] ***Colyer v. State Bd. of Registration For Healing Arts***, 257 S.W.3d 139, 146 (Mo. App. 2008). See also ***Goldberg v. Kelly,*** 397 U.S. 254, 268 – 69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). ***Jamison v. State, Department of Social Services,*** 218 S.W.3d 399, 405 – 415 (Mo. *banc* 2007).

[15] A detailed analysis here of the evidence, now admitted into the record, would be premature since no final order relying upon this evidence has issued in this case.

the Order speaks to nothing more than this point; ***"the Cards are admitted into evidence."*** As ordered here, the cards can be used for any purpose and for any reason, without limitation. The Commission has not only erred, but in my opinion, has acted unlawfully.

Terry M. Jarrett

Terry M. Jarrett, Commissioner

Submitted this 15th day of December 2009.