

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

In the Matter of the Application of Missouri Gas)
Energy, a Division of Southern Union Company,)
for a Certificate of Public Convenience and)
Necessity Authorizing it to Construct, Install,) Case No. GA-2007-0289, et al.
Own, Operate, Control, Manage and Maintain a)
Natural Gas Distribution System to Provide Gas)
Service in Platte County, Missouri, as an Expansion)
of its Existing Certified Area)

**MOTION OF THE EMPIRE DISTRICT GAS COMPANY
TO STRIKE A PORTION OF AND ATTACHMENT TO
MGE’S POST-HEARING BRIEF**

COMES NOW The Empire District Gas Company (“EDG”), by and through the undersigned counsel, pursuant to 4 CSR 240-2.080(15) and/or 4 CSR 240-2.130(17), and for its Motion to Strike a Portion of and Attachment to MGE’s Post-Hearing Brief (the “Motion”) respectfully states as follows:

1. On December 21, 2007, Missouri Gas Energy (“MGE”) filed its Post-Hearing Brief in this matter. The Commission’s Staff, the Office of the Public Counsel, and EDG also filed post-hearing briefs on December 21, 2007. Although EDG believes that MGE’s Post-Hearing Brief contains certain misstatements or mischaracterizations, since the post-hearing procedural schedule adopted herein does not provide for the filing of reply briefs, EDG will not address those misstatements or mischaracterizations herein¹. However, EDG is compelled to move to strike a portion of MGE’s Post-Hearing Brief, and the attachment thereto, since MGE is improperly attempting to supplement the record

¹ However, EDG would caution the Commission to not accept at face value the statements contained in MGE’s Post-Hearing Brief and would recommend that the Commission refer to the record evidence of this case to ascertain if any given statement in MGE’s Post-Hearing Brief is supported by the record.

in violation of the Commission's rules and previous orders herein and in violation of the due process rights of EDG.

2. Beginning at the bottom of page 11 of its brief, MGE included a section titled "Comments of Affected Customers" and, to support this section of its brief, MGE attached what it refers to as "Exhibit 1" which purports to be the statement of the developer of the Seven Bridges subdivision. A review of "Exhibit 1" shows it to be un-notarized. The Commission should strike this entire section of MGE's Post-Hearing Brief² and the un-notarized attachment³ designated by MGE as "Exhibit 1."

3. In its *Order Adopting Procedural Schedule* issued herein on April 5, 2007, the Commission stated that: "The Commission will require the prefiling of testimony as defined in 4 CSR 240-2.130. All parties shall comply with this rule, including the requirement that testimony be filed on line-numbered pages. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing."

4. Commission rule 4 CSR 240-2.130 provides in pertinent part that:

(6) . . . The prepared testimony of each witness shall be filed separately and shall be accompanied by an affidavit providing the witness' oath. . . .

(7) For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:

(A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;

(B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits

² Although MGE's brief claims its action is in response to questions from Commissioner Murray, a review of the transcript cited by MGE shows that the Commissioner did not request any post-hearing, extra-record supplements. Furthermore, her questions were in regard to the customers, not the developer.

³ Even if it was notarized, it should not be received at this late date.

contained in any other party's direct case. A party need not file direct testimony to be able to file rebuttal testimony;

(C) Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case; and

(D) Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.

(8) No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission. . . .*[There was no such order in this case]*

(11) Exhibits shall be tendered to the reporter at the time of hearing . . .

(13) Unless the presiding officer directs otherwise, when exhibits that have not previously been filed are offered in evidence, the original shall be furnished to the reporter, and the party offering exhibits also shall be prepared to furnish a copy to each commissioner, the presiding officer and each party.

(14) The presiding officer may require the production of further evidence upon any issue. The presiding officer may authorize the filing of specific evidence as a part of the record within a fixed time after submission, reserving exhibit numbers, and setting other conditions for such production. *[No such provision was made for providing further evidence after the close of the hearing in this case.]*

(16) All testimony shall be taken under oath. *[The additional material with which MGE seeks to supplement the record is not under oath.]*

5. MGE's attempt to provide additional evidence in its brief and the attachment thereto is clearly in violation of the Commission Order and Rule referenced above in paragraphs 3 and 4, and constitutes precisely the sort of "unfair surprise" which the prefiling of testimony is designed to prevent. If MGE wished to provide the testimony of the developer, it could have and should have prefiled his testimony in accordance with the Commission's Order and Rules. He would then have been available at the hearing to sponsor his testimony – under oath – and withstand cross-examination, or such testimony would not have been received into evidence. Furthermore, prior to the

hearing EDG and other parties would have had the opportunity to conduct discovery regarding his testimony and the opportunity to prefile their own testimony in response to his testimony, as his testimony should have been filed as direct testimony by MGE or, in any event, certainly no later than the rebuttal stage. MGE cannot now be allowed to provide new evidence in the form of an un-notarized statement – evidence which is not under oath and which EDG and the other parties will not be allowed to cross-examine the purported witness regarding or to otherwise rebut. **Allowing MGE to do so at this late date would clearly violate the due process rights of EDG, including the right to a meaningful hearing and the right to cross-examine and confront opposing witnesses⁴.**

6. As set forth in the *Order Adopting Procedural Schedule* issued herein on April 5, 2007, “The briefs to be submitted by the parties shall follow the same list of issues as filed in the case. The **briefs must set forth and cite the proper portions of the record** concerning the unresolved issues that are to be decided by the Commission.” (emphasis added) Briefs are *not* to contain new evidence, but are to be based on the record evidence presented at the hearing – this is a matter of basic hornbook law.

7. Furthermore, MGE has not moved that the Commission reopen the record of this case. Indeed, such a request would also be untimely, as the time for any reopening of the record has passed. *See* 4 CSR 240-2.110(8). The record of the case stands submitted. *See* 4 CSR 240-2.150(1). MGE should not be allowed to present new evidence at this late date in its brief or as an attachment to its brief.

⁴ In addition to the basic constitutional due process rights of EDG which would be violated by allowing MGE to supplement the record at this late date, remember also that Section 393.170 RSMo, under which this consolidated case was filed, requires “due hearing.”

WHEREFORE, for the reasons set forth above, The Empire District Gas Company requests an order from the Commission striking the “Comments of Affected Customers” section of MGE’s Post-Hearing Brief **and** the attachment to MGE’s Post-Hearing Brief designated by MGE as “Exhibit 1.”

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent to counsel for parties of record by depositing same in the U.S. Mail, first class postage prepaid, by hand-delivery, or by electronic mail transmission, this 28th day of December, 2007.

/s/ Jeffrey A. Keevil
