BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Missouri Gas Energy, a division of Southern Union Company, for an Accounting Authority Order Concerning Environmental Compliance Activities.	))))	Case No. GU-2007-0480

MGE'S BRIEF

COMES NOW Missouri Gas Energy, a division of Southern Union Company (MGE or Company), and, for its Brief in this matter, states as follows to the Missouri Public Service Commission (Commission):

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I. SUMMARY

MGE should be granted an accounting authority order (AAO) to defer costs it incurs to remediate former manufactured gas plant (FMGP) sites, until such time as those costs may be considered for possible recovery in a general rate case. These costs are extraordinary, unusual and unique in nature and non-recurring as to the FMGP sites.

A grant of the requested AAO for FMGP remediation costs will be consistent with the standard used in prior Missouri Commission cases concerning such requests. More specifically, numerous state utility commissions, including this Commission, have previously provided utilities with the ability to defer and/or recover FMGP remediation costs. MGE provides examples of these cases and further explains why the arguments made by the Staff and the Public Counsel are not supported by the evidence or previous Commission cases.

MGE lastly describes herein its support for certain conditions related to the issuance of the requested AAO, and explains why it opposes one of the conditions proposed by the Commission Staff.

II. ORGANIZATION

MGE's Brief will first provide background information concerning the Commission's authority with regard to accounting authority orders (AAO) and how the Commission has previously granted AAO's for costs associated with former manufactured gas plant sites. The Brief will then address the list of issues contained in the Proposed List of Issues, Order of Cross-Examination and Order of Witnesses filed on July 23, 2008, as well as the issue described in MGE's Response to Order Directing Filing, the Commission Staff's Response to Order Directing Filing on Issues and the Office of the Public Counsel's (Public Counsel) Response, filed on August 1, 2008.

III. COMMISSION AUTHORITY

The Commission, pursuant to Section 393.140, RSMo, has promulgated Commission Rule 4 CSR 240-40.040, which prescribes the use of the Uniform System of Accounts (USOA) adopted by the Federal Energy Regulatory Commission. The USOA provides for the deferred treatment of extraordinary costs. An application for an AAO contains a single factual issue -- whether the costs, which are asked to be deferred, are extraordinary in nature. *In the matter of the application of Missouri Public Service*, 1 Mo.P.S.C.3d 200, 203-204 (1991).

The Commission has in the past issued AAO's for costs "caused by unpredictable events, acts of government and other matters outside the control of the utility or the Commission." *In the matter of St. Louis County Water Company's Tariff Designed to Increase Rates*, MoPSC Case No. WR-96-263, p. 13 (December 31, 1996) (emphasis added). The Commission has further stated that it has granted AAOs and has authorized subsequent ratemaking treatment for "matters which are unpredictable and cannot adequately or appropriately be addressed within normal budgeting parameters." *Id.* at p. 14. There are many examples of AAO's based upon government actions and regulation. This includes compliance with environmental regulations. *See In the matter of the application of Missouri Public Service*, 1 Mo.P.S.C.3d 200 (1991) (related to compliance with the Clean Air Act).

As discussed in more detail below, costs associated with the remediation of FMGP sites are driven by the same factors cited by the Commission when it has granted AAO's in the past. The timing for the remediation of these sites is not predictable, the costs vary wildly from year-to-year, the costs are extraordinary and unusual for a company like MGE, and the timing of these costs are driven by government regulations and the actions of governmental agencies.

IV. PREVIOUS FMGP AAO'S ISSUED BY THE COMMISSION

The Commission has granted AAO's to natural gas companies in the past related to former manufactured gas plant remediation activities. *See In the Matter of Laclede Gas Company*, Case No. GR-96-193, 5 Mo. P.S.C. 3d 108 (1996); *In the Matter of the Application of United Cities Gas Company, a Division of Atmos Energy Corporation, for an Accounting Authority Order Related to Investigation and Response Actions Associated with Its Former Manufactured Gas Plant Site in Hannibal, Missouri*, Accounting Authority Order, Case GA-98-464 (1999).

In the *Laclede* case, Laclede was given the authority to defer "costs incurred to comply with Environmental Protection Agency regulations and orders in connection with: (1) the investigation, assessment, removal, disposal, storage, remediation or other treatment of residues, substances, materials and/or property that are associated with former manufactured gas operations or located on former manufactured gas sites; (2) the dismantling and/or removal of facilities formerly utilized in manufactured gas operations; (3) efforts to recover such costs from potentially responsible third parties and insurance companies; and, (4) payments received by Laclede as a result of such efforts.

V. FACTS

MGE owns five former manufactured gas plant (FMGP) sites in the state of Missouri. These sites are found in Kansas City (Stations A and B), St. Joseph, Joplin and Independence. Exh. 1, Noack Dir., p. 3-4. All five sites have been used by MGE as service facilities in conjunction with MGE's day-to-day operations. Tr. 142, Callaway; Tr. 64-65, Noack.

The FMGPs ceased to operate between 1900 and 1930, perhaps as late as 1935. Tr. 140, Callaway; 121, Robertson. The remnants of the FMGPs are generally no longer visible; they

have been covered over long ago and are below the ground. Exh. 5, Callaway Dir., p. 8. As such, it is impossible to ascertain the magnitude of something that cannot be seen. *Id*. No one can ascertain the scope of the investigation, assessment and remediation activities – or the magnitude of the associated costs -- until the investigation, assessment and remediation activities are conducted. *Id*. Thus, there is uncertainty as to the ultimate cost of the remediation efforts. *Id*.

MGE has experienced costs related to the remediation of certain of these sites. Significant remediation activities were previously conducted at Station A in Kansas City in 2003 and at Station B in Kansas City in 2008. Exh. 6, Callaway Sur., p. 2.

Extensive soil removal and remediation activities began in July of this year at the St. Joseph site. Exh. 6, Callaway Sur., p. 2. The costs associated with the St. Joseph remediation activities are estimated to be greater than $3.2 million. *Id*.; Tr. 169-170, Callaway.
It is not yet known when, FMGP investigation activities may be undertaken at the Joplin and Independence sites. Exh. 1, Noack Dir., p. 4. However, to the extent that FMGP investigation and remediation activities begin sometime in the future at these sites, MGE estimates that significant dollars will have to be spent on each such site in order to obtain Missouri Department of Natural Resources (MDNR) site closure. *Id*.

It was not until the early 1990s that preliminary assessments of the sites were done by regulatory officials. The sites' threat assessment score at that time led to the sites being categorized as having no immediate action planned. Tr. 141, 145-146, Callaway. In the late 1990's, there was an effort to review these sites by regulatory agencies. *Id*. It was only during this later effort that the MGE FMGP sites began to again get the focused attention of the regulatory agencies and MGE began to conduct more detailed investigation of certain sites. *Id*.

When Southern Union purchased from Western Resources in 1994 the properties that

became MGE, the parties to that transaction executed an Environmental Liability Agreement (ELA). Exh. 1, Noack Dr., p. 7. Pursuant to the ELA, Southern Union agreed to bear responsibility for the first $3 million dollars of unreimbursed FMGP remediation costs. *Id*. Southern Union also agreed to seek reimbursement from insurance companies, among others. *Id*.

This year, the remediation costs have for the first time exceeded the $8.3 million of insurance recoveries and the first $3 million of unreimbursed costs for which Southern Union agreed to take responsibility. Exh. 3, Noack Sur., p. 6; Exh. 8, Harrison Reb., Schedule 2. As of June 30, 2008, the unreimbursed expenses were at least $845,000. *Id*. It is expected that the unreimbursed remediation expenses will exceed $3.8 million by the end of this calendar year, as the remediation of the St. Joseph site progresses. *Id*.

While MGE has experienced costs associated with remediation for several years (Exh. 11), these annual costs have varied widely from a low of $4,196 in 1994 to a high of $6.4 million in 2003. Tr. 103-104, Harrison. However, MGE's current rates do not include any consideration of FMGP remediation expenses, nor have any previous MGE rates ever included recovery of FMGP remediation expenses. Tr. 102, Harrison.

MGE has requested a Commission order granting an AAO containing the following language:

> The Company is authorized to record on its books a regulatory asset, which represents its incurred costs and payments received associated with the evaluation, remedial and clean-up obligations of MGE arising out of utility-related ownership and/or operation of manufactured gas plants and sites associated with the operation and disposal activities from such gas plants. In addition to the actual remedial and clean-up costs, this regulatory asset shall also include costs of acquiring property associated with the clean up of such sites as well as litigation costs, claims, judgments, expenditures made in efforts to obtain insurance reimbursements, and settlements – including the costs of obtaining such settlements – associated with such sites. MGE may maintain this regulatory asset on its books until the effective date of the Report and Order in MGE's next general rate proceeding.

VI. ISSUES

A. MGE's Costs Associated With Former Manufactured Gas Plant (FMGP) Sites Are Extraordinary, Unusual, Unique, and Nonrecurring

Remediation actions at FMGP sites are unique events driven by compliance with federal statutes and regulations – primarily compliance with the federal Comprehensive Environment Compensation and Liability Act (CERCLA, also known as the Superfund). CERCLA imposes strict, joint and several liabilities on present or former owners of properties where substances have been, or are threatened to be, released into the environment "regardless of whether they directly released such substances into the environment." Exh. 8, Harrison Reb., p. 3. As such, CERCLA is "no-fault" legislation focused on the public interest associated with the clean-up of sites, not the assignment of blame or penalties.

The impact of CERCLA and the clean up of specific FMGP sites is not a recurring event, although costs related to compliance may be paid out over several years. Remediation actions at FMGP sites are not a normal, everyday part of MGE's business, nor are they usually a significant part of MGE's normal environmental compliance activity. Exh. 6, Callaway Sur., p. 2. This can be seen by the fact that MGE's employee who handles environmental matters, MGE witness Callaway, is an Environmental Compliance Specialist rather than a specialist in environmental remediation. Exh. 5, Callaway Dir., p. 1. The bulk of Ms. Callaway's duties as a Compliance Specialist have to do with permitting activities, hazardous waste operations and related training. Tr. 151, Callaway. Ms. Callaway's job description does not mention FMGP remediation, nor were FMGP sites even discussed when she interviewed for her current position. Tr. 151-152, 169, Callaway.

MGE cannot and does not staff for this type of work because it is infrequent and

specialized. Exh. 6, Callaway Sur., p. 3. Significant soil removal and remediation activities will have only occurred three times since Southern Union acquired the MGE properties in 1994. Exh. 6, Callaway Sur., p. 2. These events were at Station A in Kansas City in 2003, Station B in Kansas City in 2008 and St. Joseph, also in 2008. *Id*.

MGE must outsource these specialized functions to environmental companies, laboratories, trucking companies, landfills, project managers, and myriad other environmental specialists and experts to support such projects. Exh. 6, Callaway Sur., p. 3. Those companies have geologists, engineers, technicians, and equipment operators that are able to provide the support that such a specialized and complex project requires. *Id*. There are very few environmental companies that have the type of experience, depth, and skill to successfully manage and remediate a FMGP site. *Id*. Those costs that are incurred before large remediation projects begin (site assessments, investigations, and monitoring activities) also require the assistance of outside specialists. *Id*. The fact that this type of expertise and support is required for an FMGP remediation indicates that this type of activity is unusual and extraordinary.

Further, the requirements at each remediation site differ depending upon state and federal regulatory requirements, agency assessments of work performed, changes in regulations or laws, and site-specific characteristics, among other things. State and/or federal environmental agencies exercise jurisdiction over the FMGP sites and regulate the investigative and remedial activities. Exh. 5, Callaway Dir., p. 7. Companies performing investigative and remedial activity submit proposals to the oversight agency for approval in each step of the investigative and remedial process. *Id*. After submittal of proposed work plans or during the remediation process, agencies may require additional investigation or remediation activities which may affect the scope of the activities and the magnitude of the associated costs. *Id*. The timing of an agency

response to a submittal can vary significantly ranging from a few weeks to a few years. *Id*.

FMGP costs are unique to each FMGP site because each site has variable characteristics that affect the scope and magnitude of the remediation activity. Soil types, site gradient, subsurface water flow, the type of buildings and the containers originally used in the manufacturing process all impact costs. Exh. 6, Callaway Sur., p. 4-5. Even after initial site assessment and analysis, the extent and scope of remediation often changes once excavation begins because the impacted areas are underground and the extent of impacted areas are not readily ascertainable. *Id*. Ultimately, each site has its own unique characteristics and each will have unique costs associated with any remediation activity. *Id*.

The costs associated with these requirements are unusual and infrequent as to MGE and the individual sites. Specific remediation activities are unlikely to be repeated at each FMGP site and will not recur once the remediation of those sites is final. Exh. 6, Callaway Sur., p. 4. Once a company proceeds with FMGP remediation, the company ultimately must obtain official closure of the site by the state or federal regulatory agency directing the activity. *Id*. Similar activity (i.e. further soil and debris removal or subsequent monitoring) may be required at different stages of a project or on different parts of a site, but a repetition of steps is not likely once they are completed. *Id*. Once official closure is obtained, further remediation costs are unlikely to recur. *Id*.

Official closure is a realistic goal. Such official closure has been received by MGE as to soil issues at the Kansas City Station A site. Tr. 159, Callaway. A "no further action" letter has also been issued in regard to the Kansas City Port Authority site, a non-MGE owned site located in close proximity to the Station A and Station B sites. Tr. 170-171, Callaway.

B. Similar Findings By Other State Commissions

State Commissions and courts have found FMGP remediation costs to be extraordinary. The Superior Court of Delaware, in addressing a similar issue, found as follows in regard to the extraordinary nature of FMGP clean-up costs:

> Extraordinary expenses, on the other hand, are generally defined as "an expense characterized by its unusual nature and infrequency of occurrence; *e.g.* plant abandonment, goodwill write-off, large product liability judgment." BLACK'S LAW DICTIONARY at 587 (6th ed. 1990).
>
> Based on these general definitions, the Court finds that the Commission's decision that the environmental remediation costs incurred and to be incurred by Chesapeake are extraordinary expenses is supported by substantial evidence. The event which occasioned these expenses, the imposition of liability under CERCLA, is not itself a recurring event, regardless of the fact that costs related to complying with orders issued under CERCLA may be paid out over several years. While it is not uncommon for utility companies, particularly gas utilities, to be held liable for such cleanups, this realization does not alter the fact that such liability probably is unusual and infrequent (or nonrecurring) with respect to the individual utility. The utility cannot predict with any accuracy for the future how often it will be found liable for environmental remediation, or whether it will be found liable at all. These considerations demonstrate that imposition of liability by federal law is suddenly creating costs for companies where such costs did not previously exist.

Chesapeake Utilities Corporation v. Delaware Public Service Commission, 705 A.2d 1059, 1068 (Del. Super. Ct. 1997).

A similar result was reached by the New York Commission in *Petition of Central Hudson Gas & Electric Corporation for Approval to Defer Environmental Site Investigation and Remediation Costs,* Case No. 01-G-1821, 2002 N.Y. PUC LEXIS 566 (NYDPS, 2002) (". . . costs that Central Hudson will incur to investigate and remediate the remaining MGPs are unanticipated and nonrecurring in nature.").

The Minnesota Public Utility Commission found in relevant part as follows in regard to FMGP expenses:

> Prompt attention to the MGP site remediation will likely benefit gas ratepayers by minimizing environmental litigation or fines. The Company is strongly pursuing third party recovery by identifying and pursuing insurance claims and initiating legal action when necessary. Interstate is cooperating in the MPCA-sponsored accelerated remediation program, a process which is meant to shorten the cleanup process and control costs.
>
> The Commission finds that in this case Interstate's MGP costs are substantial, extraordinary, and unforeseen. Deferral of these costs will be consistent with the public interest.

In the Matter of a Request by Interstate Power Company for Deferral of Expenses Associated with Former Manufactured Gas Plants, Docket No. G-001/M-95-687, 1996 Minn. PUC LEXIS 58 (Minn. PUC, 1996).

C. The Commission Should Grant MGE an Accounting Authority Order (AAO) to Allow it to Defer Costs Associated with the clean-up of FMGPs

The FMGP remediation costs are extraordinary expenses that are not otherwise provided for in MGE's rates. Tr. 102, Harrison. The great variation of these expenses from year to year[1] makes it difficult to establish a traditional, ongoing, normal level of FMGP remediation expense that will be fair to both shareholders and customers. MGE seeks an accounting authority order so that it may defer its FMGP costs until such time as they can be considered for possible recovery in a rate proceeding. Without such treatment, there is no mechanism for Commission consideration of these expenses.

This remediation process and the associated expenses are beyond the control of MGE. MGE cannot ignore the remediation requirements because they are driven by Congress' enactment of CERCLA (a statute focused on the public's interest in clean-up, rather than fault)

[1] For example, $22,346 in 1995, $6,412,071 in 2003, $191,827 in 2005 and over $3.8 million in 2008. Exh. 13; Exh. 3, Noack Sur., p. 6.

and related state provisions. The Commission has previously granted AAO's in similar situations where utilities are required to act in accordance with changes to statutes, regulations and rules (for example, compliance with the Clean Air Act, changes in the Safety Line Replacement Program, changes to the Cold Weather rule, accounting changes such as FAS 106. Tr. 125, Robertson.

Approximately twenty-nine (29) state utility commissions, including this Commission, plus the District of Columbia, have provided public utilities with deferral and/or recovery of FMGP remediation costs. Exh. 3, Noack Sur., p. 15. The Illinois Supreme Court, in affirming the creation of a FMGP cost recovery mechanism, found, in part, that "the cost of delivering utility service reasonably encompasses current costs of doing business, including necessary costs of complying with legally mandated environmental remediation." *Citizens Utility Board v. Illinois Commerce Commission*, 651 N.E.2d 1089, 1096 (Ill. 1995).

Additional support for a finding that the public has an interest in clean-up activities and the recovery of expenses associated with environmental compliance can be gleaned from Section 386.266.2, RSMo, which provides for a mechanism by which a gas corporation may make "periodic adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any federal, state or local environmental law, regulation, or rule."

C. Miscellaneous Arguments

1. Southern Union's Purchase Has No Impact

On January 31, 1994, Southern Union purchased the Missouri gas properties now being operated as MGE from Western Resources, Inc. (Western Resources). The FMGP sites that are at issue in this case were a part of the Western Resources properties. Tr. 122, Robertson. At the

time Western Resources owned the sites, it was a Missouri public utility providing service to Missouri customers. *Id*. After the sale, those same FMGP sites were then owned by Southern Union – also a Missouri public utility.

As part of the purchase transaction, Southern Union and Western Resources entered into an Environmental Liability Agreement (ELA) with respect to future costs associated with the FMGP sites that were a part of Western Resources' operations. Exh. 1, Noack Dr., p. 7. The ELA made Southern Union responsible for the first $3,000,000 of out of pocket costs and expenses incurred to respond to and remediate the FMGP sites. *Id*. Thereafter, Western Resources was required to share one-half of the next $15,000,000, of any such costs and expenses. *Id*. at Sch. MRN-1.

As a result of this agreement, the Southern Union purchase and the resulting ELA has put MGE's customers in a better position than they were in before the purchase. This is because the potential liability for the FMGP sites existed with the public utility (then Western Resources) before Southern Union's purchase. Absent the purchase, the system would have had the same potential liability for FMGP remediation it has today. What is different is that pursuant to the ELA, Southern Union agreed to bear responsibility for the first $3 million dollars of unreimbursed costs and a non-Missouri utility - Western Resources – agreed, subject to certain conditions, to bear some responsibility for additional unreimbursed costs incurred before January 31, 2009.

For approximately fourteen years, the result of the Southern Union purchase has protected MGE's customers from any contribution toward remediation costs. In addition to absorbing the first $3,000,000 in costs, Southern Union's aggressive insurance recovery project has yielded $8.3 million in recoveries on behalf of the MGE properties through June 30, 2008.

Exh. 4, Morgan Sur., p. 3.

Southern Union's purchase has been a benefit to customers. It is not a reason to deny the requested AAO.

2. Purchase Price Does Not Include Adjustment for FMGP Sites

Public Counsel witness Robertson alleged that the purchase price paid by Southern Union for its acquisition was adjusted downward to account for the FMGP liability. Exh. 12, Robertson Reb., p. 33. This argument is no more than pure speculation by a non-participant in the negotiating process that resulted in the asset purchase agreement between Southern Union and Western Resources, Inc.

The circumstances certainly do not support such a finding. First, because of the unpredictable nature of FMGP remediation costs, the full extent of the potential liability - in terms of dollars – is not even know today, almost 15 years after the closing of the transaction. Exh. 4, Morgan Sur., p. 8. It would have been impossible to quantify any reduction in purchase price on the basis of non-existent information. *Id*. Second, as explained previously, FMGP costs are routinely included in the regulated cost of service of local distribution companies throughout the country. *Id*. Consistent with this, Southern Union's assumption when undertaking the acquisition of the MGE properties was that FMGP costs would be recoverable through regulated rates. *Id*.

Public Counsel witness Robertson did not participate in the Southern Union negotiations to purchase the MGE properties. While the purchase price is not relevant in this matter, he has no foundation to say what may or may not have been contemplated in the purchase price. When combined with Mr. Morgan's testimony, there is no reasonable basis or credible evidentiary support to deny deferral as a result of Southern Union's purchase of the MGE properties.

3. Deferred FMGP Costs Need Not Be Material and Known and Measurable

Staff cites as support for its proposed sub-issue concerning materiality and known and measurable nature of the expenses the Commission's Report and Order in Cases Nos. EO-91-358 and EO-91-360 (cited above as *In the matter of the application of Missouri Public Service*, 1 Mo.P.S.C.3d 200 (1991)). However, there is no requirement in either the cited reports or orders or even in the Uniform System of Accounts that costs must be "material" or "known and measurable" in order to be deferred as extraordinary. Although materiality is not essential in an AAO proceeding, MGE clearly exceeds the five percent materiality threshold in this case. Further, the question of whether costs are "known and measurable" is solely an issue for a rate case, not an AAO proceeding, so Staff's assertion is inapplicable. *See In the Matter of the Application of Missouri Gas Energy*, Report and Order, Case No. GU-2005-0095 (September 8, 2005) (". . . uncertainty surrounding MGE's obligation to pay a significant amount of taxes is an unusual and unique situation").

Regardless, the costs MGE seeks to defer will be known and measurable at the time of deferral and, certainly prior to such time as they may considered for recovery in a rate case.

Materiality/5% Test

In the case cited by the Staff, the Commission stated as follows in regard to materiality:

> . . . the crux of the criterion is, what is an extraordinary event? This, of course, will be the primary focus of the Commission in any case involving a request for an AAO. The issues of whether the event has a material or substantial effect on a utility's earnings is also important, but not a primary concern. The company, under the USOA, is required to seek Commission approval if the costs to be deferred are less than five percent of the company's income computed before the extraordinary event. This five percent standard is thus relevant to materiality and whether the event is extraordinary but is not case-dispositive.

Missouri Public Service, 1 Mo.P.S.C.3d 200, 206. Thus, the five percent test and materiality are not case determinative. *See also In the Matter of the Application of Missouri Gas Energy*, Report and Order, Case No. GO-99-258 (MoPSC 2000) ("materiality is an issue that may be considered when determining whether to allow deferral of expenses. However, a finding of materiality is not necessary to allow deferral. . . .").

This being said, the expenses here will be far in excess of five percent of the Company income. In his Rebuttal Testimony, Staff witness Harrison indicated that the Staff's last calculation of the amount of MGE's net operating income on an adjusted basis was $36,123,186. Exh. 8, Harrison Reb., p. 10. Five percent of this income figure would be $1,806,159. Tr. 106-107, Harrison. When Mr. Harrison performed a similar calculation using the net operating income from MGE's 2007 FERC Form 2 ($36,383,230), he found five percent of that figure to be $1,819,162. *Id*.

MGE's remediation expenses in 2008, beyond reimbursements and the first $3 million for which Southern Union shareholders accepted responsibility, will be at least $3,845,233. Exh. 3, Noack Sur., p. 6; Tr. 67, Noack. This level of expense is more than twice as much as the five percent threshold. MGE's FMGP expenses are clearly material.

Known and Measurable

The fact that costs may not be known or measurable does not prohibit the issuance of an accounting authority order concerning those costs. *See In the Matter of the Application of Missouri Gas Energy*, Report and Order, Case No. GU-2005-0095 (September 8, 2005).

In fact, support for the proposition that there is no requirement that costs be "known and measurable" in order to be deferred (as opposed to recovered) is found in the very same *Missouri Public Service* case cited by the Staff. When asked to point to such language during the hearing,

Staff witness Harrison indicated that there is language in the order suggested that the event not be "speculative." Tr. 112, Harrison. The FMGP remediation costs in this case are certainly not speculative. MGE has already incurred many of the costs, is in the process of incurring additional costs and clearly will be required to incur additional costs in regard to the owned cites.

Deferral orders routinely relate to future costs. In fact, again looking to the *Missouri Public Service* case cited by Staff, reveals that the Commission's order was issued in December of 1991, and was designed to allow deferral of projected costs to be incurred in the year 1992. *Missouri Public Service*, 1 Mo.P.S.C.3d 200, 213 (emphasis added); Tr. 100-101, Harrison. There is no fundamental requirement that a deferral order be issued after the subject costs have been incurred.

4. Risk Not Provided for in Return on Equity

Public Counsel witness Robertson has alleged that "the rate of return provided Missouri regulated utilities has always incorporated a percentage above the risk-free rate of return in order to compensate [shareholders] for the business and financial risks associated with actions such as the implementation of both existing and new laws and regulations mandated by governments." Exh. 12, Robertson Reb., p. 13.

If Mr. Robertson is correct, he has a revelation that will change the result of years of Commission decisions. This Commission has previously granted AAO's to public utilities for a variety of matters, to include: deferral of costs related to floods, ice storms, accounting changes (such as FAS 106), compliance with the Clean Air Act, regulatory changes associated with the safety line replacement program, year 2000 compliance projects and cold weather rule compliance. Tr. 125, Robertson. The Missouri Commission has not used Mr. Robertson's theory to deny deferral in any of the cited examples, to include deferrals associated with

government action. There is nothing unique about this case that would lead to a different result.

VII. PROPOSED CONDITIONS

A. Agreed to Conditions

MGE believes it would be reasonable for the Commission to order the following conditions in conjunction with the granting of an accounting authority order in this case:

- That any recoveries from insurance companies, Westar or other entities related to FMGP remediation costs be credited to the deferral account as an offset to deferred expenses. Exh. 3, Noack Sur., p. 8;
- That nothing in the Commission's order shall be considered a finding by the Commission of the reasonableness of the costs and/or expenditures deferred and reserving the Commission's right to consider in a future rate case the ratemaking treatment to be afforded all deferred costs, including the recovery of carrying costs, if any;
- That MGE shall (1) maintain detailed supporting records, work papers, invoices and other documents to support the amount of costs deferred under this AAO, including any related deferred taxes recorded as a result of the cost deferral and (2) provide detailed documentation that includes a complete description of the type of work performed, the specific FMGP site and amount of time spent for each invoice submitted for all legal expenses deferred under this AAO; and,
- That the AAO continue through the end of the Commission-ordered test year as updated, or true-up period, in MGE's next rate case, provided MGE files its rate case within 24 months of the effective date of this order. In the event MGE fails to file a general rate case within twenty-four months of the effective date of the

order the AAO, MGE shall write-off the entire amount of previously booked deferrals to income.[2] Exh. 3, Noack Sur., p. 8.

B. Proposed 50% Percent Condition

Staff's testimony further suggested a condition that the "the Commission limit the amount of MGE's deferral to 50% of its unreimbursed FMGP expenditures pursuant to the sharing provisions of MGE's Environmental Liability Agreement with Western Resources, Inc." Exh. 8, Harrison Reb., p. 13-14.

MGE will seek to recover costs from Western Resources (now Westar) and agrees that it should credit the deferral account for any recovery received from Westar. This is similar to how MGE has treated previous recoveries from third parties as to date MGE has given 100% credit to all third party collections or reimbursements. Tr. 67, Noack. However, it would be premature to make provision for any Westar recoveries as MGE does not know whether, when or how much will be recovered from Westar under the ELA. Exh. 3, Noack Sur., p. 7; Tr. 68, Noack; Exh. 4, Morgan Sur., p. 7.

MGE witness Morgan further indicated that he believes that a deferral of all FMGP remediation expenses, to include those potentially recoverable from Westar, will not "void" the ELA. Tr. 77, Morgan. MGE will continue to pursue Westar for its share of the FMGP costs. *Id*.; Exh. 4, Morgan Sur., p. 7; Exh. 14. As this case concerns deferral, and not recovery, the ultimate expenses and any recoveries should be examined as a whole when they are considered in a rate case.

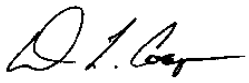
[2] Staff agreed with this rewrite of Staff's proposed condition both through a data request that was admitted into evidence (Exh. 13) and the testimony of Staff witness Harrison (Tr.194-196, Harrison).

VIII. CLOSING

The FMGP remediation process and the associated expenses are beyond the control of MGE. MGE cannot ignore the remediation requirements because they are driven by governmental mandate and the timing of these expenses is such that MGE has been unable to address them through the rate making process. MGE should be granted an AAO to defer costs it incurs to remediate the FMGP sites until such time as those costs may be considered for possible recovery in a general rate case.

WHEREFORE, MGE prays the Commission consider this Brief and, thereafter, issue its order granting MGE's Application.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, or sent by electronic mail, on October 10, 2008, to the following:

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