

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

In the Matter of Tariff Revisions filed by)	
Missouri Gas Energy, a Division of)	Case No. GR-2006-0422
Southern Union Company, Designed to)	
Increase Rates for Natural Gas Service.)	

**REPLY SUGGESTIONS IN SUPPORT OF
MISSOURI GAS ENERGY'S MOTION TO EXCLUDE
THE TESTIMONY AND OPINIONS OF RUSSELL TRIPPENSEE**

COMES NOW Missouri Gas Energy, a division of Southern Union Company ("MGE" or the "Company"), by and through counsel, and in further support of its Motion to Exclude and in reply to the Office of the Public Counsel's Response which was filed herein on January 2, 2007, respectfully states as follows:

MGE objects to the admission of Mr. Trippensee's testimony in this proceeding. There has not been a proper foundation laid to show that Mr. Trippensee is qualified as an expert, and, more significantly, it is clear that Public Counsel cannot demonstrate that Mr. Trippensee's testimony is reliable. These failures go not just to weight or credibility, but to the admissibility of Mr. Trippensee's testimony. Mr. Trippensee's testimony cannot lawfully be admitted unless there is a showing that the facts and data upon which he relies are of a type reasonably relied upon by experts in the applicable field. The Commission must also make an independent assessment as to whether the facts and data relied upon are otherwise reasonably reliable.

Primarily through the testimony of MGE witness Feingold, the Company is proposing two rate design proposals. The primary proposal establishes a Straight Fixed-Variable ("SFV") rate structure for the residential class. The Staff of the Commission is proposing a rate design similar to the SFV rate structure proposed by the Company. Through the testimony of MGE witness Hanley, the Company recommends use of a common equity cost rate of 11.75 percent and a hypothetical capital structure. Mr. Hanley also recommends that the common equity cost

rate of 11.75 percent be reduced to 11.6 percent if the Company's proposed Weather Normalization Adjustment ("WNA") mechanism is approved or to 11.5 percent if the Company's proposed SFV rate design proposal is approved.

Public Counsel witness Trippensee prepared and filed testimony in this matter purportedly to address the revenue requirement implications of the proposed rate designs, and he stated that Public Counsel recommends that the ROE be set at "an appropriate point" between 7.70 and 8.65 percent. Mr. Trippensee confirmed that he is holding himself out as a cost of capital expert witness in this proceeding and is recommending what he believes is the appropriate return on equity for MGE.

A. Standard for Admission of Expert Testimony. The standards for admissibility of expert testimony in civil cases in Missouri are those set out in RSMo. §490.065, and that same standard should be applied in administrative cases such as proceedings before the Commission.¹ Pursuant to the statute, if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify in the form of an opinion. The purported expert having *some* qualifications, however, is not the end of the inquiry. Public Counsel appears to gloss over this point.

Section 490.065 requires a showing that the facts and data upon which an expert relies are of a type reasonably relied upon by experts in the applicable field.² The statute also requires the agency to make an independent assessment as to whether the facts and data relied upon are otherwise reasonably reliable.³ Public Counsel touts the qualifications of Mr. Trippensee (a BS degree in Business Administration, 250 hours of study in accounting, ten years as a supervisor of rate of return witnesses), but Public Counsel simply cannot show that the facts and data relied

¹ *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 155 (Mo. banc 2003); *Lasky v. Union Electric Co.*, 963 S.W.2d 797 (Mo. banc 1997).

² *McDonagh*, 123 S.W.3d at 156.

upon by Mr. Trippensee are of the type reasonably relied upon by experts in the field. The information relied upon by Mr. Trippensee is so slight as to render his opinion fundamentally unsupported.⁴

B. Discussion and Argument. Public Counsel asserts that MGE seeks to exclude the testimony of Mr. Trippensee to “allow MGE an opportunity to supplement its argument” and take “valuable time and resources these state agencies require to best serve the interests of the public.”⁵ In this rate case proceeding, it should be the Commission’s goal to establish a fair and reasonable rate of return for MGE. The acceptance of Mr. Trippensee’s testimony would be contrary to that goal. Counsel for MGE is obligated by the Rules of Professional Conduct to challenge the admission of Mr. Trippensee’s testimony – testimony which is unsupported and unreliable. This is not a new tactic to supplement MGE’s argument and take away valuable time and resources, as alleged by Public Counsel.

Applying the standards of §490.065, and in the case of *McGuire v. Seltsam*, 138 S.W.3d 718 (Mo. 2004), the Supreme Court held that the trial court abused its discretion in finding that the facts and data upon which the expert relied were reasonably reliable. The Court determined that the testimony should have been excluded, as it was based upon “assumption, surmise and incompetent facts.” The sole point on appeal involved the admission into evidence of the expert’s testimony. The Court acknowledged that whether expert opinion testimony satisfies the requirements of §490.065 is a matter of trial court discretion, but the Supreme Court, which had accepted the case for transfer after opinion by the Western District, reversed and remanded because the testimony did not meet the statutory standard.

³ *Id.*

⁴ See *Alcorn v. Union Pacific Railroad*, 50 S.W.2d 226, 246 (Mo. 2001).

⁵ The Office of the Public Counsel’s Response to Missouri Gas Energy’s Motion to Exclude the Testimony and Opinions of Russell Trippensee, pp. 1 and 6, ¶¶2, 11.

No matter how much Public Counsel challenges the motives of MGE, the fact remains that the facts and data upon which Mr. Trippensee relies are not of a type reasonably relied upon by experts in the applicable field and are not otherwise reasonably reliable.⁶ Mr. Trippensee did not perform any mathematical calculations or take any steps to calculate what would be a fair return on equity for MGE in this proceeding, and he did not conduct any studies to justify his position regarding risk reduction or the appropriate ROE for MGE. He simply looked to the data set forth in Staff's testimony. Mr. Trippensee saw no reason to "replicate the Staff's work" or "verify all of their sources."⁷

Mr. Trippensee's failure to verify the data relied upon by him, and Mr. Trippensee's failure to conduct any meaningful due diligence regarding the facts and data relied upon by Staff's and the Company's witnesses, are evidence that Mr. Trippensee's opinions in this case are unreliable and fundamentally unsupported. If Mr. Trippensee had made any reasonable effort to ascertain the facts behind his testimony, he would have learned that many of the proxy companies utilized by Staff's and MGE's witnesses enjoy protections from weather variance and some also have protections in the form of revenue decoupling mechanisms.⁸ Additionally, Mr. Trippensee argues that if the fixed delivery charge proposed by Staff is put into place, MGE will "effectively be guaranteed to earn the authorized rate of return" with regard to a particular class of customers.⁹ Mr. Trippensee then admitted, however, that under Staff's proposed capital structure, common shareholders would face additional risk, and Mr. Trippensee acknowledged

⁶ Additionally, MGE maintains that, pursuant to RSMo. §490.065, Mr. Trippensee is not qualified by knowledge, skill, experience, training, or education to provide return on equity testimony in this proceeding and does not possess scientific, technical, or other specialized knowledge to assist the Commission with understanding the evidence or determining a fact at issue. Supervising financial analysts does not make one an expert in the field. Mr. Trippensee had not previously calculated a return on equity cost rate for an LDC, and he has never, on his own, performed a DCF or similar type of modeling technique analysis.

⁷ Trippensee Deposition, pp. 16, 20.

⁸ Hanley Surrebuttal, p. 22; Murray Surrebuttal, p. 18; *see also* the December 2006 issue of the *Natural Gas Rate Round-Up*, attached as Appendix B to MGE's Motion to Exclude.

⁹ Trippensee Rebuttal, p. 6.

that ROE is never guaranteed.¹⁰

Further, despite the fact that the information was readily available to Mr. Trippensee, Mr. Trippensee had not reviewed MGE's earnings history and was unaware of MGE's specific earnings for recent years. Contrary to the standards set out in *Bluefield Water Works v. Public Service Comm'n.*, 262 U.S. 679 (1923) and *Fed. Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), Mr. Trippensee appears to be of the opinion that a utility's rate of return just needs to be high enough to keep the company out of bankruptcy.¹¹ Mr. Trippensee accuses Company witness Hanley of ignoring certain data and points to an average of authorized returns for the third quarter of 2006. Mr. Trippensee, however, failed to mention that the "average" of 9.6 percent consists of the authorized ROR for only one company.¹² This is yet another example of Mr. Trippensee's failure to verify the data relied upon by him in rendering his opinions, and is yet another example of the unreliability of his testimony.

Mr. Trippensee simply cannot satisfy the requirements of RSMo. §490.065 with regard to his cost of capital testimony. If an expert's information "is so slight as to render the opinion fundamentally unsupported," the opinions offered by that expert should be excluded.¹³ Accordingly, MGE urges the Commission to exclude Mr. Trippensee's filed testimony and otherwise prohibit Mr. Trippensee from offering "expert" testimony related to the issue of return on equity in this matter.

WHEREFORE, MGE respectfully requests that the Commission issue its order granting MGE's motion to exclude the testimony and opinions of Public Counsel witness Russell

¹⁰ Trippensee Deposition, p. 27.

¹¹ Trippensee Deposition, pp. 31, 38, 53.

¹² Mr. Trippensee was also unaware of the fact that the number resulted from a settlement, and he did not know whether the test year in that case was a future or historical test year, whether the rates authorized provide for any sharing mechanism, and whether the rates are to be phased-in or implemented all at once. Trippensee Depo., p. 39.

¹³ *Alcorn*, 50 S.W.2d at 246.

Trippensee. MGE requests such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,

/s/ Diana C. Carter

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, sent by U.S. mail, or electronically transmitted on this 5th day of January, 2007, to all parties of record.

/s/ Diana C. Carter