BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Michael Stark,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. GC-2014-0202
	)	
Summit Natural Gas of Missouri, Inc.,	)	
	)	
Respondent.	)	

STAFF'S PRE-HEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and pursuant to the procedural schedule in this matter hereby submits its *Pre-Hearing Brief*.

INTRODUCTION

Staff continues to recommend the Commission dismiss the complaint because the facts do not show that Summit Natural Gas of Missouri (SNG) violated any statute under the Commission's jurisdiction, any Commission rule or order, or any provision of SNG's tariff. In Staff's view, the facts of the complaint and the relief requested suggest that this matter should be adjudicated in civil court pursuant to Missouri civil law.

The complaint in this case concerns SNG's mistaken installation of pipe on the property of Michael Stark ("Mr. Stark" or "Complainant") and the subsequent washout of parts of his private road where the pipe was installed. Mr. Stark's Complaint filed December 27, 2013, alleges that SNG committed trespass and caused property damage, and Mr. Stark requests that "SNG should be required to compensate me for

their trespass and property damage." On January 2, 2014, Complainant sent a written statement that his "damages should be considerably higher" than $3000. On February 6, 2014, Mr. Stark requested additional relief, asking the Commission to revoke SNG's Certificate of Convenience and Necessity (CCN).[1]

In the filings in the case, SNG admitted that it entered upon a section of Mr. Stark's property and installed pipe along his private road under the mistaken belief that it was installing the pipe along the county right-of-way in Camden County.[2]

On February 10, 2014, Staff filed its *Staff Recommendation to Dismiss Case*, recommending that the Commission dismiss the case because the Commission is without authority to grant the relief requested, and because neither the tariff nor the Commission's rules apply to the facts of this case.

On May 21, the Commission issued its *Order Denying Motions to Dismiss and Order Directing Filing*. The Commission said that "[i]n this instance, the Commission has been informed that a utility, regulated by the Commission, has trespassed upon and damaged private property. The question remains of whether this is true and if so, whether it is a violation of a statute, tariff provision, Commission rule or order."

As will be discussed in this brief, the question of whether SNG violated Missouri civil trespass law[3] and its liability for any damage is squarely within the jurisdiction of

[1] Staff's February 10 *Recommendation to Dismiss Case* indicated that the Missouri Supreme Court has held that the Commission does not have the authority to revoke the CCN of any utility company because 393.170 RSMo provides no authority or standard to revoke a CCN. *State ex rel. City of Sikeston v. Public Service Commission of Missouri*, 336 Mo. 985, 997 (Mo.1935). This brief does not address this issue any further.
[2] *Response to Commission Order,* filed June 2, 2014.
[3] Section 537.340 RSMo *et seq.*

Missouri's civil courts. The Commission's statutes grant it no authority to adjudicate a question of trespass or award damages.

Further, SNG's tariff does not apply to these facts because this event took place while SNG was in the "initial build out" of its gas system in this area. At the time of the event, there was no gas flowing through this portion of SNG's territory, and no customers were receiving gas service in this portion of SNG's territory. Because SNG was in the initial build-out stage and not making an extension to existing facilities, its tariff is not applicable to these facts.

Finally, because no gas was, or ever will be, flowing in the pipe installed on Mr. Stark's property, the Commission's gas safety rules do not apply to this pipe. These issues are discussed in more detail below.

During its initial build-out, SNG is subject to the general laws of Missouri; indeed, Mr. Stark has filed a suit against SNG for trespass in civil court.[4] The Commission should dismiss this case and allow the civil court to hear Mr. Stark's case and grant the relief it deems justice requires.

ARGUMENT

The Commission does not have jurisdiction to adjudicate this complaint or grant the relief the Complainant has requested.

Any person or public utility who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision within the Commission's jurisdiction may file a complaint.[5]

[4] *Response to Commission Order*, June 2, 2014, page 5, paragraph 23.
[5] 4 CSR 240-2.070; Section 386.390 RSMo.

"It is the exclusive jurisdiction of the Public Service Commission, in the first instance, to decide all matters placed with the Commission's jurisdiction by the Public Service Act…. the Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incident thereto." [6]

"The judicial power is… vested in a Supreme Court, the St. Louis, Kansas City, and Springfield Courts of Appeal, circuit courts, criminal courts, probate courts, county courts, and municipal corporation courts. That these do not include the Public Service Commission is plain."[7] "The character of the proceeding is not affected by the remedy which the complainant may have in mind to enforce his order."[8]

"The Public Service Commission is an administrative body, and not a court, and hence the Commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund."[9]

Under the doctrine of primary jurisdiction, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision. This policy applies "(1) where administrative knowledge and expertise are demanded (2) to determine technical, intricate fact questions and (3) where uniformity is important to the regulatory scheme."[10]

---

[6] *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943).
[7] *Missouri Valley Realty Co. v. Cupples Station Light, Heat & Power Co. et al.*, 199 S.W. 151, 153 (Mo. 1917).
[8] *Id.* at 154.
[9] *State ex rel. Laundry, Inc. v. Public Service Commission,* 34 S.W.2d 37, 46 (Mo. 1931).
[10] *Killian v. J&J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. banc 1991). In *Evans v. Empire District Electric Company*, the Western District Court of Appeals explained that that "the concept of 'primary jurisdiction' is really a question of whether the trial court has a statutory right to proceed." 346 S.W.3d 313, 316 (Ct. Apps. W.D. 2011).

The Commission considered a similar situation in *Tawanda Murphy v. Union Electric Company d/b/a Ameren UE*.[11] In that case, the complainant alleged a tort claim predicated on the negligence theory of *res ipsa loquitur*. Complainant alleged that Ameren UE breached a duty to properly maintain, inspect and repair its equipment supplying electricity to her property, and that this caused a fire and property damage.[12] The Commission directed Staff to complete its investigation and report to the Commission whether Ameren UE violated any statute, regulation or tariff provision under the jurisdiction of the Commission. In that case, Staff determined that the fire was apparently caused by a tree limb that fell onto a secondary wire. The tree was situated on private property and therefore beyond the control of the utility, and therefore Staff found that the facts did not show that Ameren UE violated any statute, tariff or Commission order. [13]

Because Ms. Murphy did not allege any billing dispute or issue regarding provision of her electric service, the Commission found that her complaint did not evoke any substantive principles of law which may entitle her to a form of relief the Commission could award pursuant to its regulations. To the extent that Ms. Murphy was required to exhaust all available remedies with the Commission, the Commission found that she had met that requirement.[14]

The Commission should reach a similar conclusion here. The Missouri Public Service Commission has not been delegated authority to interpret or award damages pursuant to Missouri's civil trespass law, and therefore cannot make the findings or

[11] EC-2010-0364. 2010 WL 3616007 (Mo.P.S.C.).
[12] *Id*., *Order Dismissing Complaint*, filed Sept. 8, 2010.
[13] *Id.*
[14] *Id.*

conclusions Mr. Stark requests. Judicial resolution of Stark's trespass complaint does not require "administrative knowledge and expertise… to determine technical, intricate fact questions," nor is a decision on these facts a matter of uniformity regarding the regulatory scheme of utility rates and service.

The proper venue for this complaint is in Missouri's civil court, where Mr. Stark has filed suit against SNG for trespass. Civil courts routinely adjudicate cases of this nature involving public utilities.[15] The Commission should decline to exercise jurisdiction over this case and dismiss the complaint so that Mr. Stark's civil trespass case can proceed in the proper civil forum.

As directed by the Commission in its May 21 *Order Denying Motions to Dismiss and Order Directing Filing* in this matter, Staff has reviewed relevant statutes under the Commission's jurisdiction, as well as SNG's tariff and the Commission's gas safety rules. The facts of this case do not show a violation of those laws, as discussed below.

SNG did not violate Section 393.130.1, because the alleged actions of SNG did not result in circumstances hazardous to human health or safety.

The Commission's May 21 order indicates that the applicability of Section 393.130 RSMo is an open question. The facts of this case do not show a violation of this statute because SNG was not flowing gas or serving customers with gas in this area, and therefore this event caused no hazard to human health or safety.

Mo. Rev. Stat. Section 393.130.1 (2014) states in part: "Every gas corporation… shall furnish and provide such service instrumentalities and facilities as shall be safe

[15] See, e.g., *Vaughn v. Missouri Pub. Serv. Co*., 616 S.W.2d 540 (Mo. Ct. App. 1981); *Sterbenz v. Kansas City Power & Light Co.*, 333 S.W.3d 1 (Mo. Ct. App. 2010); *Rahm v. Missouri Pub. Serv. Co*., 676 S.W.2d 906 (Mo. Ct. App. 1984); *Harris v. L. P. & H. Const. Co*., 441 S.W.2d 377 (Mo. Ct. App. 1969); *Wedemeier v. Gregory*, 872 S.W.2d 625 (Mo. Ct. App. 1994); *Franke v. Sw. Bell Tel. Co*., 479 S.W.2d 472 (Mo. 1972); *Alexander v. Laclede Gas Co.*, 725 S.W.2d 129 (Mo. Ct. App. 1987).

and adequate and in all respects just and reasonable." The relevant language in Section 393.130.1 can be divided into two prongs: (A) the "safe and adequate"[16] prong; and (B) the "just and reasonable" prong. The facts in this case do not show a violation of either prong based upon past precedent in Missouri's courts of law or past orders decided by the Commission.

A. The "safe and adequate" prong of Section 393.130.1 was not violated by SNG because a violation occurs only when circumstances hazardous to human health or safety exist, and the present circumstances do not rise to such a level.

Court cases and Commission decisions discussing Section 393.130.1 show that a public utility violates the "safe and adequate" prong of Section 393.130 when its actions endanger the health or safety of the public. These discussions indicate that this statute should not be applied to an allegation of trespass during a utility's initial build-out.

For example, *State v. Local No. 8–6, Oil, Chem. & Atomic Workers Intl. Union* involved a strike that hampered Laclede Gas Company's ability to serve all its customers.[17] Four days after the strike began, the governor of Missouri seized Laclede by issue of executive order, but the strikers refused to return to work. The State of Missouri then filed suit against the union in the Circuit Court of the City of St. Louis, which enjoined the strikers from participating in the strike any longer.

[16] At least one court has found that the word "adequate" requires a public utility to provide continuous service to its customers, *see National Food Stores, Inc. v. Union Electric Co.*, 494 S.W.2d 379 (Mo. App. 1973), but this analysis is irrelevant here as no service was ever commenced.

[17] 317 S.W.2d 309 (Mo. 1958), *vacated*, 361 U.S. 363 (1960). The Supreme Court of the United States vacated the judgment for reasons not relating to its purpose in this analysis: because "there remained for court no actual matters in controversy essential to decision of the particular case before it." *See* 361 U.S. 363, 363 (1960).

The union appealed the decision on constitutional grounds.[18] The circumstances under which the Missouri high court concluded that the health and safety of the public were jeopardized included the fact that Laclede's 364,000 customers used their natural gas supply for purposes of "cooking, water heating, refrigeration, and space heating."[19] Additionally, "[p]ractically all of the hospitals in the St. Louis area used gas for sterilization, hot water heating, cooking and space heating. Doctors and dentists in the area were also furnished with gas for their office purposes."[20]

Because of the community's reliance on gas service to maintain public health and safety, the crux of the problem was that "[d]uring the first ten days of the strike, Laclede received in excess of 13,000[21] service calls concerned principally with complaints that the gas service had failed or that leaks existed in the streets."[22] "There were also reports of gas escaping into the sewer systems and causing gas fires which had to be extinguished."[23] The Supreme Court of Missouri, in holding that "[i]t is quite clear that the 'patrons' of Laclede Gas Company were not furnished with 'safe and adequate' service after the strike," reasoned that the evidence "was sufficient to prove that there was a serious and alarming interruption of utility service and the public interest, health and safety were jeopardized."[24] So the court in *Local No. 8-6* afforded considerable weight to the dangerous conditions created by the strike in balancing whether Laclede's post-strike supply of natural gas was safe and adequate.

---

[18] Analysis of the union's constitutional claims is unnecessary here as it does not relate to the "safe and adequate" prong.
[19] *See Local No. 8*-6, 317 S.W.2d 309, 317 (Mo. 1958), *vacated*, 361 U.S. 363 (1960).
[20] *Id*.
[21] The normal number of complaints was around 100. *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 318.

In a more recent case, *Off. Pub. Counsel v. Warren County Water and Sewer Co.,*[25] the circumstances were similar to those in *Local No. 8-6*. *Warren* involved a water and sewage treatment plant, which was brought before the Commission by a complaint from the Office of the Public Counsel ("OPC") alleging that the plant was failing to provide safe and adequate service to its customers. The Commission found in favor of OPC and the plant was placed under the control of a receiver. The Commission held that the "conclusion that the Company is unable or unwilling to provide safe and adequate service is inescapable," since the owner of the plant failed to maintain: the required water pressure, the required amount of water storage space, warning indicators, locked electrical boxes, satisfactory fences, and the proper number of blower motors.[26] Furthermore, the Commission noted that the plant owner's lack of record keeping and bill payment, "while not a direct threat to the safety of the customers, indicate[s] a general inability or unwillingness to comply with applicable standards."[27]

In both *Local No. 8-6* and *Warren*, the court and the Commission, respectively, came to identical conclusions after considering very similar circumstances. In both cases it was decided that the utility failed to provide safe and adequate service. In both cases the decision makers focused mainly on whether the public utility contributed to or created circumstances which placed the public in harm's way. In *Local No. 8-6* the harm was gas leakage, gas shortage, and gas fires. In *Warren* the harm was unhealthy

[25] *See* 2002 WL 32057523 (Mo.P.S.C.) (West 2002).
[26] *Id.* at 2.
[27] *Id*. The Commission felt the need to explicitly point out that failing to keep records and pay bills was not a direct threat to the safety of customers, implying that the standard for balancing whether service is safe and adequate is whether the service poses a direct threat to the safety of customers.

water pressure, insufficient water storage space, and failure to abide by numerous safety guidelines. Thus in both cases both the court and the Commission based their decisions finding a failure to provide safe and adequate service on the presence of circumstances obviously hazardous to the health or safety of the public.

This case law shows that Section 393.130 addresses the utility's service to its customers. This is not the situation of Mr. Stark's complaint. The present circumstances are that SNG relied on available county maps, causing SNG to mistakenly deposit a nonoperational section of gas pipe under Mr. Stark's private road. A portion of the road later became damaged after rain washed out sections of the backfill that SNG put over the section of gas pipe. Section 393.130 must be read in light of the Commission's role to protect members of the public who depend on a natural monopoly for essential services—as shown in the cases above, the statute addresses problems that arise when large numbers of people depend on a utility for heat, power, drinking water, or sanitation. The statute should not be used to improperly adjudicate a trespass claim by an individual property owner where no such hazard to public health or safety occured.

B. The "just and reasonable" prong of § 393.130.1 was not violated by SNG in the present circumstances because this prong applies to rate challenges, and here, there is no rate challenge.

In 2013, the Commission interpreted the "just and reasonable" prong by considering Staff's evaluation of "whether the rates paid by consumers for natural gas sold during the period were 'just and reasonable,' pursuant to Section 393.130.1."[28] Since Mr. Stark is not, nor does he claim to be, a customer of SNG and since Mr. Stark

[28] *Off. Pub. Counsel v. Mo. Pub. Serv. Commn.*, 409 S.W.3d 371, 373 (Mo. banc 2013).

does not challenge SNG's rates, the "just and reasonable" prong has no significance to Mr. Stark's claim.

SNG did not violate its tariff because SNG's tariff applies only to customer extensions of existing facilities, and SNG's installation of the pipe on Mr. Stark's property was part of its initial build-out of new facilities in the Lake Ozark Division as provided by its Commission approved CCN.

Generally, a "tariff" is a public document setting forth services to be offered, rates and charges with respect to those services, and governing rules, regulations and practices relating to those services.[29] SNG's tariff P.S.C. MO No. 1 is titled "Schedule of Rates, Rules and Regulations And Conditions of Service Governing the Provision and Taking of Natural Gas Service."[30] The tariff begins with maps of SNG's certificated area, then provides the rates and charges applicable to various types of natural gas service the company provides to different customer classes.

Then, the tariff includes various rules and regulations that apply to the provision of gas service. In its *Order Denying Motion to Dismiss*, the Commission specifically noted that First Revised Sheet No. 73(19)(a) refers to "right-of-way" agreement(s) that must be obtained when the Company is installing distribution main extensions. First Revised Sheet 72(18)(a) also refers to right-of-way agreements that must be obtained when the Company is installing gas distribution main extensions.

First Revised Tariff Sheet No. 58 defines Customer Extension as "[a]ny branch from, or continuation of, *existing facilities* to the point of delivery to the customer… including all mains, service pipe, pressure regulators, and meters."[31] (Emphasis added).

[29] 64 Am. Jur. 2d Public Utilities Section 61, quoting Pacific S.S. Co. v. Cackette, 8 F.2d 259 (CCA 9th Cir. 1925).
[30] P.S.C. MO No. 1 Sixth Revised Sheet No. 1.
[31] First Revised Tariff No.58

This leads to two conclusions: (1) that all extensions defined in SNG's tariff are customer extensions, so long as the purpose of the extensions is to deliver gas to customers, and (2) “extensions” as defined in SNG's tariff can only be made to “existing facilities.” All extensions in SNG's tariff are customer extensions because, as the tariff states, customer extensions include "all mains, service pipe, pressure regulators and meters," so long as its purpose is to deliver gas to customers. Since, by definition, extensions can only be made to existing facilities, the installation of new facilities during the initial build-out is not an “extension” governed by SNG’s tariff. Indeed, these tariff provisions regarding extension of facilities refer to obligations of the “customer” and “applicant,”[32] because these provisions govern expansion of an existing, functional gas system at a customer or applicant’s request.

These tariff provisions concerning “extensions of distribution facilities” and “extensions of mains” do not apply to the initial build-out of the gas system, because there are no “existing facilities” from which distribution facilities or mains can be extended. The tariff provisions apply when gas is flowing in the system and is being sold to customers, and a main is extended from one of those existing facilities. The tariff governs the terms, conditions, and charges under which SNG will extend a functioning gas system to serve new customers in the certificated area when those customers apply for new service.

[32] “The customer shall provide a meter location on his property that is satisfactory to the Company.” PSC MO. No. 1 First Revised Sheet 72 18(a). “Upon receipt of application from a prospective customer, the Company will estimate the cost of installing the customer extension necessary to provide the requested service.” *Id*. at First Revised Sheet 73, 18(c). “The Company will install service lines (pipe) on the applicant’s property.” *Id.* at 19(a)(2). See also Sheets 73 and 74 section (2) and (21) referring to how the Company will apportion the cost of these extensions, which are made to existing facilities at a customer or prospective customers’ request.

Here, SNG was in the process of its initial build-out in the Lake Ozark Division pursuant to its CCN in Case No. GA-2012-0285, approved by the Commission in July 2012. SNG installed the section of pipe on Mr. Stark's property on June 18, 2013. Since SNG installed the section of pipe on Mr. Stark's property during the initial build-out, this case does not involve an extension of an existing facility under SNG's tariff. SNG's tariff has no provisions for the initial build-out of facilities, during which time SNG is obligated to comply with all state, county and municipal laws. Therefore, the facts of this case do not show a violation of SNG's tariff.

SNG did not violate the Commission's Safety Standards for Transportation of Gas by Pipeline Rule 4 CSR 240-40.030 because the gas pipe installed by SNG was never operational and the Commission's Safety Standards for Transportation of Gas by Pipeline Rule only apply to pipe when it is used to transport gas.

Finally, pursuant to the Commission's May 21 Order, Staff reviewed its gas safety rules at 4 CSR 240-40.030. The facts of this case do not show a violation of these rules.

Rule 4 CSR 240-40.030(1)(A)(1) states that the scope of the Commission's Safety Standards for Transportation of Gas by Pipeline Rule is to prescribe minimum safety requirements for *pipeline* facilities and the *transportation* of gas in Missouri and under the jurisdiction of the Commission.[33] (Emphasis added). The scope of this rule is explained in the definitions of "pipeline" and "transportation" within the rule. 4 CSR 240-40.030(1)(B)(28) defines pipeline as "all parts of those physical facilities *through which gas moves in transportation*"[34] (emphasis added). That is to say, a *pipeline* under the Commission's rule is only the physical facilities through which gas is already

[33] 4 CSR 240-40.030(1)(A)(1).
[34] 4 CSR 240-40.030(1)(B)(28).

transported. Rule 4 CSR 240-40.030(1)(B)(37) defines “transportation” as the gathering, transmission, or distribution of gas by pipeline or the storage of gas in Missouri.[35] These definitions show that the Commission's Safety Standards for Transportation of Gas by Pipeline were promulgated to protect the health and safety of the public from the hazards of transporting gas through gas pipelines.

Here, SNG installed a section of pipe on Mr. Stark's property under the mistaken belief that his private road was a public right-of-way. Later, rain washed out portions of the backfill used to cover the pipe, and Mr. Stark has alleged property damage.

The section of pipe does not now have, nor has it ever had, gas flowing through it. Nor has it ever been connected to any pipeline that did have gas flowing through it. The Commission's Safety Standards for Transportation of Gas by Pipeline were not promulgated to protect the public from trespasses committed by utility company employees or from property damage committed by a utility company or its employees. These tort actions are outside the Commission's jurisdiction and should be adjudicated by a civil court. The Commission's Safety Standards for Transportation of Gas by Pipeline Rule applies to those physical facilities used in the transportation of gas, and the pipe SNG installed on Mr. Stark's road is not and never was used for the transportation of gas. Therefore, the Commission's Safety Standards for Transportation of Gas by Pipeline are inapplicable to the facts of this case.

SNG did not violate the Commission's Safety Standards for Transportation of Gas by Pipeline Rule 4 CSR 240-40.030 because the gas pipe installed by SNG was

[35] 4 CSR 240-40.030(1)(B)(37).

never operational and the Commission's Safety Standards for Transportation of Gas by Pipeline Rule only apply to pipe used to transport gas.

CONCLUSION

In response to the Commission's order, Staff carefully reviewed the statutes and rules under the Commission's jurisdiction, SNG's tariff, and applicable case law. Staff found no express or implied authority for the Commission to adjudicate Mr. Stark's claim, and Staff found that the facts do not show a violation of any of the statutes or rules under the Commission's jurisdiction, or any provision of SNG's tariff.

These findings do not mean that Mr. Stark is without recourse; rather, Staff's conclusion is that the Commission is not the appropriate venue. The Commission should decline jurisdiction of this matter so that the civil court may proceed to adjudicate Mr. Stark's claim.

WHEREFORE, Staff submits its *Pre-Hearing Brief* for the Commission's consideration.

Respectfully submitted,

/s/Alexander Antal
Alexander Antal
Assistant Staff Counsel
Missouri Bar No. 65487

/s/ John D. Borgmeyer
John D. Borgmeyer
Deputy Staff Counsel
Missouri Bar No. 61992

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751- 8517 (Telephone)
(573) 751-9285 (Fax)
Alexander.Antal@psc.mo.gov
John.Borgmeyer@psc.mo.gov

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 29th day of August 2014, to all counsel of record in this proceeding.

/s/Alexander Antal