BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	
Laclede Gas Company, doing business as Missouri Gas Energy,	)	**Case No. GC-2014-0216**
and	)	
Southern Union Company, formerly doing business as Missouri Gas Energy,	)	
Respondents.	)	

STAFF'S RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Response to Respondents' Motions to Dismiss,* states as follows:

Introduction

1. A natural gas explosion and subsequent fire occurred on the evening of February 19, 2013, at JJ's Restaurant in Kansas City, Missouri, killing one person, injuring more than a dozen others, destroying the restaurant and its contents, damaging nearby buildings, and leaving more than a score of persons unemployed.[1]

2. Thereafter, Staff conducted an investigation to determine whether or not Missouri Gas Energy ("MGE"), the regulated natural gas utility serving JJ's Restaurant

[1] This event will be referred to herein as "the explosion."

and vicinity, had violated any Missouri statutes, Commission rules, Commission orders or tariff provisions in connection with the explosion.

3. On February 6, 2014, Staff filed its investigation report (*"Staff Investigation Report"*) in Case No. GS-2013-0400, the investigatory docket opened by the Commission with respect to the explosion, and also a complaint initiating this case against Respondents Southern Union Company, which formerly did business as MGE, and Laclede Gas Company, which presently does business as MGE.

4. On March 10, 2014, the day originally set for Respondents to answer Staff's *Complaint,* each of them filed a motion to dismiss.

5. On March 11, 2014, the Commission directed Staff to respond to those motions by March 20, 2014.

Southern Union Company's Motion to Dismiss

6. By its *Motion to Dismiss,* Southern Union Company ("PEPL") purports to make a "special appearance" for the limited purpose of contesting the Commission's jurisdiction, a procedural device unknown to the rules of this Commission. Therein, PEPL explains that it no longer even exists, having merged into its subsidiary, Panhandle Eastern Pipeline Company, LP, on January 14, 2014.[2] PEPL goes on to assert that, by the Commission's *Order Approving Unanimous Stipulation and Agreement,* issued on July 17, 2013, in Case No. GM-2013-0254,[3] "Southern Union's responsibilities as a gas corporation subject to the jurisdiction of the Commission were

[2] *Southern Union's Motion to Dismiss,* p. 3..

[3] ***In the Matter of the Joint Application of Southern Union Company d/b/a Missouri Gas Energy, The Laclede Group, Inc., and Laclede Gas Company for an Order Authorizing the Sale, Transfer, and Assignment of Certain Assets and Liabilities from Southern Union Company to Laclede Gas Company and, in Connection Therewith, Certain other Related Transactions,*** Case No. GM-2013-0254 (***Order Approving Unanimous Stipulation and Agreement,*** iss'd July 17, 2013).

terminated and Southern Union ceased to be an entity subject to the Commission's jurisdiction."[4] PEPL further asserts that its Purchase and Sale Agreement ("PSA") with Laclede assigned all liability for the explosion to Laclede and that, by approving the parties' stipulation and agreement and ordering them to perform the PSA, the Commission absolved PEPL of all responsibility and liability for the explosion. Finally, PEPL asserts:

> Even if Southern Union did exist as a separate entity, by the terms of the Commission's Order in Case No. GM-2013-0254, Southern Union (or Panhandle as its successor in interest) would not be subject to the Commission's jurisdiction and the liabilities, which are the subject of this complaint, have been transferred to Laclede. Southern Union or Panhandle would not properly be party to this matter and should, therefore, be dismissed.[5]

7. PEPL is mistaken. First, PEPL need not be a regulated entity *now* to be held to answer by the Commission for the violations of its regulated predecessor-in-interest on February 19, 2013.

8. PEPL is also mistaken as to the effect of the Commission's *Order Approving Unanimous Stipulation and Agreement,* issued on July 17, 2013, in Case No. GM-2013-0254. Missouri courts have held that the Commission is without authority to approve a tariff that immunizes a public utility from negligence liability for injury, death or damage to property.[6] It follows that the Commission also cannot so immunize a public utility by approving a stipulation and agreement or by directing the parties to a purchase and sale agreement to comply with its provisions.

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[4] *Id.,* at p. 2.

[5] *Id.,* at p. 3.

[6] ***Public Service Commission v. Missouri Gas Energy,*** 395 S.W.3d 540, 545-546 (Mo. App., W.D. 2013); ***Public Service Commission v. Missouri Gas Energy,*** 388 S.W.3d 221, 230-231 (Mo. App., W.D. 2012).

9. Neither is PEPL correct that it has evaded liability for the explosion by merging into its subsidiary. Missouri courts recognize the traditional distinction between: (1) "corporate mergers or the sale and purchase of outstanding stock of a corporation, whereby preexisting corporate liabilities also pass to the surviving corporation or to the purchaser"; and (2) "the sale and purchase of corporate assets[,] which eliminates successor liability."[7] PEPL expressly tells us in its motion that PEPL is successor to Southern Union following a merger.[8] "It has also been held to be the general rule in this state that in the absence of constitutional or statutory provisions to the contrary where one corporation goes entirely out of existence by being annexed to or merged in another corporation, then the subsisting corporation will be entitled to all the property and will be answerable for all the liabilities. When the benefits are taken, then the burdens are assumed."[9] "[T]he universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself."[10] "[T]he surviving corporation stands in the shoes of the disappearing corporation in every respect. And that concept is uniformly codified in every merger statute."[11] As Southern Union's successor by merger, PEPL has succeeded to

[7] ***Edwards v. Black Twig Marketing and Communications LLC,*** 418 S.W.3d 512, 520 (Mo. App., E.D. 2013), *quoting* ***Chem. Design, Inc. v. Am. Standard, Inc.,*** 847 S.W.2d 488, 492–93 (Mo. App., E.D. 1993).

[8] *Id.,* at ¶6.

[9] ***State ex rel. Consol. School Dist. No. 8 of Pemiscot County v. Smith,*** 343 Mo. 288, 296, 121 S.W.2d 160, 162 (Mo. banc 1938).

[10] ***Fitzgerald v. Pratt,*** 223 Ill.App.3d 785, 166 Ill.Dec. 200, 585 N.E.2d 1222, 1227 (1992).

[11] ***Krull v. Celotex Corp.,*** 611 F.Supp. 146, 148 (N.D.Ill.1985); *see also* ***Aetna Life & Cas. v. United Pac. Reliance Ins. Cos.,*** 580 P.2d 230, 232 (Utah 1978) ("[T]he surviving corporation ... simply stands in the same position as that occupied by the merged corporation ... prior to the merger."); ***Eaton v. Weaver Mfg. Co.,*** 582 F.2d 1250, 1252 n. 1 (10th Cir.1978) ("[T]he resulting corporation stands in the shoes, in effect, of the merged corporations.").

Southern Union's liability for the explosion.

10. The PSA governing the sale of Southern Union's fictitious name and gas distribution assets used in Missouri to provide gas service to the Kansas City area, including JJ's Restaurant on the evening of February 19, 2013, was able to allocate financial responsibility for civil liabilities associated with the explosion among the parties to the transaction but was not able to transfer away Southern Union's responsibility for the actions that its agents and employees took, or failed to take, up to, during and after the explosion. The survivors of Megan Cramer, the persons injured physically or financially, those with property damage, were not parties to the PSA and it cannot abridge their rights to seek redress. Similarly, the PSA cannot abridge the rights of the Commission or its Staff. For these reasons, PEPL's *Motion to Dismiss* should be denied.

Laclede's Motion to Dismiss, or in the Alternative, To Hold Case in Abeyance while Staff Provides a More Definite Statement And to Reopen the Investigation Case

11. Laclede presents two motions for the Commission's consideration, one of them with an alternative. First, Laclede moves the Commission to either dismiss this case without prejudice or to hold it in abeyance, while Staff, in re-opened Case No. GS-2013-0400, revises and updates its *Staff Report* to reflect "the sworn testimony of the eyewitnesses presently being provided in the ongoing civil litigation."[12] Laclede's second motion is to re-open Case No. GS-2013-0400 and conduct proceedings in that case rather than in this one. Laclede, in its motion, also asserts Staff's *Complaint* fails to state a claim.

[12] *Laclede's Motion to Dismiss,* pp. 1-2.

Fatal to Laclede's assertion that Staff's *Complaint* fails to state a claim is its admission as follows: "To be very clear, MGE does not contend that Staff or the Commission lack the authority to investigate and pursue their statutory duties. MGE also does not suggest that the Commission should abstain from its duties in favor of the private civil litigation."[13] A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.[14] All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[15] Complainants enjoy the benefit of all reasonable inferences.[16] The complaint should not be dismissed unless it shows no set of facts entitling it to relief.[17] A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.[18] This rule means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading.[19] The Eastern District of the Missouri Court of Appeals has said the same thing:

> On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with

[13] *Id.,* at pp. 3-4.

[14] For this discussion, *see* J.R. Devine, ***Missouri Civil Pleading and Practice,*** Section 20-3 (1986).

[15] ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[16] *Id.*

[17] *Id.*

[18] ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,*** 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

[19] ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend***, iss'd Feb. 4, 2003) pp. 5-6.

> judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.[20]

12. Staff's *Complaint* identifies the Respondents and plainly states the conduct in question and the Commission regulations that Staff asserts were thereby violated. The relief sought is within the Commission's power to grant. The *Complaint* sufficiently states a case under the ***Kansas City Terminal Railway*** standard.

13. Laclede accurately states that MGE made incident reports as required by Commission rule and that it cooperated fully with Staff's investigation. Laclede also accurately notes that the ongoing civil litigation has already, and will continue to, further develop the factual record surrounding the explosion. Staff concedes that it would be duplicative and unnecessarily costly to independently duplicate that factual record before the Commission. However, duplication of effort is unnecessary.[21] In terms of parallels, Staff notes that the Commission did not delay its proceedings on the Taum Sauk collapse while the associated civil litigation went forward.[22]

14. While delaying this case would permit the record to be developed by the ongoing civil litigation, Staff suggests that there are other considerations. One is the length of time the civil litigation process may take. How long, exactly, does Laclede

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[20] ***Sorbello v. City of Maplewood,*** 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); ***Schrewe v. Sanders,*** 498 S.W.2d 775, 777 (Mo. 1973); *and see* ***Giessow v. Litz,*** 558 S.W.2d 742, 749 (Mo. App.1977).

[21] Staff has submitted DRs to MGE in this case (and in GS-2013-0400) seeking all of the factual material so far developed in the civil litigation; the DRs impose a continuing obligation to update the material provided to Staff as additional items become available.

[22] In Taum Sauk, the investigatory docket proceeded as a contested case hearing and Staff's investigation report was submitted after the hearing before the Commission was completed. *See* Case No. ES-2007-0474. Staff filed no complaint regarding Taum Sauk.

propose to delay? Another is the recommendations Staff has proposed to protect the public in the future. Any delay of this case necessarily means that curative regulatory changes will also be delayed. This is a matter of some concern given Laclede's position that MGE made no errors with respect to the explosion.[23] Finally, to the extent that Laclede believes it is in possession of facts showing that MGE was not at fault, it may (and should) put them before the Commission for consideration in this case.

WHEREFORE, by reason of all the foregoing, Staff prays that the *Motions to Dismiss* filed by PEPL and Laclede be denied. As for Laclede's alternative *Motion to Hold This Case in Abeyance,* Staff prays that, if the Commission grants it, it should be granted only until the discovery phase of the civil litigation is completed; and that the Commission grant such other and further relief as is just in the premises.

Respectfully submitted,

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[23] "If Staff will pause long enough to consider the eyewitness testimony, MGE is confident that Staff would revise and/or withdraw many of the allegations made in the Report, and, in particular will reconsider its decision to single out MGE in the Complaint." *Laclede's Motion to Dismiss,* p. 6. Staff did not "single MGE out"; however, as MGE was the Commission-regulated natural gas entity involved in the explosion, Staff only focused this complaint on MGE's actions in the *Staff Report*. This by no means should be taken as evidence that Staff believes that all other participants were blameless in this incident, but this Commission does not regulate all of those entities.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties of record listed in the official service list maintained for this case by the Data Center of the Missouri Public Service Commission either by First Class United States Mail, postage prepaid, or by hand delivery, or facsimile transmission, or by electronic mail, on this **20th day of March, 2014.**

Kevin A. Thompson