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May 27, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

**Re: Staff of the Missouri Public Service Commission v. Southern Union Company
Case No. GC-2003-0348**

Dear Mr. Roberts:

On behalf of Southern Union Company, I deliver herewith an original and eight (8) copies of a Reply of Southern Union Company to Responsive Pleadings of Staff of the Commission for filing with the Commission in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel. Service copies have been mailed or hand-delivered this date.

I have also enclosed an extra copy which I request that you stamp "Filed" and return to the person delivering them to you.

Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Paul A. Boudreau

PAB/ccp
Enclosures
cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED⁴

MAY 27 2003

Staff of the Missouri Public Service
Commission,

Complainant,

v.

Southern Union Company,

Respondent.

Missouri Public
Service Commission

Case No. GC-2003-0348

**REPLY OF SOUTHERN UNION COMPANY TO RESPONSIVE PLEADINGS OF
STAFF OF THE COMMISSION**

COMES NOW, Southern Union Company ("Southern Union" or "Respondent") d/b/a Missouri Gas Energy ("MGE"), and for its reply to the responsive pleadings filed by Staff¹, offers the following general reply:

1. Staff's Responses to Southern Union's Answer and Motion to Dismiss and to the Commission's May 12, 2003 Order Directing Filing demonstrate that Staff has failed to address the obvious problem with its Complaint, that is, it fails to state facts forming the basis for the Commission to grant any relief. After three attempts to clarify the opaque allegations in its Complaint, the basis for Staff's grievance is as inscrutable as when the Complaint was first filed. In fact, Staff now readily admits that it "does not yet have information to list the specific assets or property . . . that SU sold or transferred to ONEOK

¹ Staff Response to Southern Union Company's Answer to Staff's Complaint (filed May 7, 2003), Staff Response to Southern Union Company's Motion to Dismiss Complaint or for Referral to Voluntary Mediation (filed May 7, 2003) and Staff Response to the Commission's Order Directing Filing (filed May 19, 2003).

beyond the details in the 'Purchase Agreement'".² Instead, Staff again points to the existence of a Transition Services Agreement whereby ONEOK agreed to provide certain **services** on an interim basis to Southern Union associated with payroll, tax and other business activities.³ Staff states that Southern Union's Answer to the Complaint is "nonresponsive and evasive" because it "failed to identify any assets".⁴ Staff filed the Complaint. The allegations in the Complaint are ambiguous at best. Southern Union is not in a position to fill in the blanks of Staff's Complaint because Southern Union is at a loss to understand how the sale of its **Texas** operating division has any bearing on the jurisdiction of the Commission. To the contrary, Staff is the only party in a position to articulate specifically what part of Southern Union's franchise, works or system necessary or useful in the performance of its duties to the public in the State of Missouri Staff thinks has been sold or transferred to ONEOK.⁵ Staff has yet to explain the factual basis of its Complaint even after having been directed by the Commission to "describ[e] with specificity all property that Southern Union sold that forms the basis of Staff's complaint".

² Staff Response to the Commission's Order Directing Filing, ¶7.

³ The jargon used by Staff apparently has evolved in its latest filing. Previously, Staff had used the words "services" and "functions" to describe routine business activities. A new term now has been introduced. Staff is now using the word "operations" to describe such activities. This is creative nomenclature but it is no substitute for the requirement that Staff specify what part of MGE's "franchise, works or system necessary or useful in the performance of its duties" are claimed to have been sold to ONEOK.

⁴ Staff Response to the Commission's Order Directing Filing, ¶15.

⁵ Staff, in its most recent pleading, alleges that Southern Union has "failed to respond to Staff's discovery." This is simply not true. Southern Union has not yet received any data requests from Staff in this case. The data request to which Staff refers was issued in Case No. GM-2003-0238, the Panhandle Eastern Pipeline Company acquisition case. That data request was timely answered and Staff did not object to the response provided or seek an order compelling any different or additional information. In fact, the Commission issued an order approving Southern Union's application in that case on March 27, 2003 pursuant to a unanimous stipulation.

2. Southern Union's Motion to Dismiss shows that none of the gas distribution works or system used in connection with MGE's operations in this state have been transferred to ONEOK. Two salient points bear repeating.

- The Financial General Ledger and Human Resources software identified in Staff's Complaint in paragraph 15: (1) was excluded from the sale of Southern Union's Texas division to ONEOK, (2) is still located in the State of Missouri and (3) is still being used by MGE at its offices in Kansas City. Staff knew this before it filed the Complaint. Staff's responses do not refute these facts. To the contrary, Staff appears to concede these facts in paragraph 4 of the Staff Response to the Commission's Order Directing Filing wherein Staff states that "Southern Union has excluded some assets" from the sale of its Texas operating division to ONEOK.
- The balance of the amount identified by Staff (less than \$750,000) is simply an allocation of certain overhead costs in MGE's last rate case concluded in 2001(associated with furniture and fixtures, certain improvements and communications equipment) used to provide corporate support functions. Corporate support functions are still being provided by Southern Union to MGE, but now these functions are housed in Southern Union's corporate headquarters in Wilkes-Barre, Pennsylvania. Thus, the corporate support functions to which the costs relate were not transferred to ONEOK. Staff does not refute this fact.

Staff's responsive pleadings are an attempt to obfuscate the fact that the Complaint is based on a fiction. ONEOK did not end up with any of the franchise, works or system that

is necessary or useful in the performance of MGE's duties to the public in the State of Missouri. MGE still provides natural gas service within those areas certificated to it by the Commission without impairment or interruption. MGE still owns and controls its distribution network and carries out its public service obligations. Under the circumstances, allowing the Complaint to proceed would be a waste of time, energy and scarce resources.

3. Staff's responsive pleadings have made it plain that the only thing going on here is that Staff is unhappy about the fact that Southern Union's former Vice-President of Gas Supply, Mr. Michael Langston, was moved to EnergyWorx, a wholly owned subsidiary of Southern Union.⁶ The irony of this situation is that while the Complaint is couched in terms of what "function" Southern Union may or may not have transferred to ONEOK (or EnergyWorx), Staff is really complaining about the fact that MGE has taken its gas purchasing responsibility in-house. In other words, this case is not about what has been discarded by Southern Union, it is about what has been acquired by MGE. More specifically, an activity that had been provided for MGE out of Austin, Texas will now be carried out by employees of MGE in Kansas City, Missouri.

4. While on the subject of Mr. Langston, Southern Union will simply observe the additional irony in the fact that Staff in this case lauds Mr. Langston's knowledge and competence (a person Staff refers to as Southern Union's "knowledgeable gas procurement department manager")⁷ while simultaneously seeking to disallow

⁶ The Management Services Agreement between EnergyWorx and AIG was terminated on or about May 12, 2003, consistent with Southern Union's commitment to divest EnergyWorx. Consequently, Mr. Langston's service with EnergyWorx has concluded.

⁷ Staff's Response to Southern Union Company's Response to Staff's Motion to Open a Case to Investigate Southern Union's Transfer of its Gas Supply Department, ¶12, Case No. GO-2003-0354.

approximately \$15 million of MGE gas costs related to the winter of 2000/2001 in Case Nos. GR-2001-382 et al. (See attachment). Mr. Langston was Vice-President of Gas Supply during this period. Staff's position in the ACA case does not appear to square with its theory in this case that Mr. Langston (or the department he once headed) is irreplaceable.

5. Staff attempts to maneuver around management's right to make personnel assignments and to change work responsibilities by offering the theory that people are property because they are merely assets owned by utilities.⁸ This is a disturbing notion and anchored in the echoes of the most painful civil strife ever to have afflicted this nation since its inception. The concept that individuals are chattel property had been put to rest during the mid-1800's at the cost of over 500,000 lives when the states of the southern confederacy attempted to secede from the union. Relying on the 1998 HVAC legislation appearing in Chapter 386 RSMo⁹, Staff nevertheless has concluded that the Missouri General Assembly intended that people (at least those people employed by Missouri utilities) be treated as no more than "assets." Staff's reliance on this unrelated legislation is misplaced. Southern Union does not own its employees and the Commission has no jurisdiction with respect to these matters.

6. Southern Union will not reply to each and every statement contained in Staff's many responsive pleadings and thereby burden an already confused record. There are several items, however, that require a specific rebuttal.

⁸ Staff Response to Southern Union Company's Motion to Dismiss Complaint or for Referral to Voluntary Mediation, ¶10.

⁹ §386.754 through §386.762 RSMo 2000.

- Southern Union has not admitted that it has sold any of its franchise, works or system necessary or useful in the performance of its duties to its customers in the State of Missouri, as has been alleged by Staff. To the contrary, Southern Union specifically denies that allegation and the specific denial appears in both its Answer¹⁰ and throughout its Motion to Dismiss.
- Staff claims that Southern Union's Answer is "evasive" and that its affirmative defenses are an attack on the Commission, Staff and the law.¹¹ To the contrary, Southern Union has simply followed the customary practice of admitting and denying the individual allegations contained in the Complaint and, also, complying with the Commission's practice rules which state that an answer to a complaint shall include "[a]ll grounds of defense both of law and fact." 4 CSR 240-2.070(8). The Complaint includes inaccurate and misleading factual statements. The Complaint also contains serious allegations of wrongdoing on the part of Southern Union. Under the circumstances, Southern Union is both obligated and entitled to set the record straight.¹²
- Staff suggests that Southern Union failed to notify the Missouri Attorney General of certain of its affirmative defenses founded on constitutional principles.¹³ Staff

¹⁰ Paragraph 21 E and F.

¹¹ Staff Response to Southern Union Company's Answer to Staff's Complaint, p. 1; Staff Response to the Commission's Order Directing Filing, ¶5.

¹² Were Staff serious about getting "simple answers," it would have accepted Southern Union's informal proposal on April 7, 2003, that Staff withdraw its Complaint (without prejudice to its right to re-file) and cooperate with Southern Union in an investigation of the matters alleged in the Complaint. Southern Union's overture was rebuffed. Staff is hardly in a position now to protest that Southern Union is asserting its defenses, as required by the Commission's pleading rules.

¹³ Staff Response to Southern Union Company's Answer to Staff's Complaint, ¶ 7.

did not include any citation to legal authority so Southern Union can only speculate as to the basis for Staff's claim. The only such notice requirement of which Southern Union is aware appears in the Missouri Declaratory Judgment Act that is not applicable in the circumstances of this case. That statute provides that the Attorney General's Office must be notified in those cases where a party institutes a declaratory judgment action in which a statute, ordinance or franchise is alleged to be unconstitutional. See, §527.110 RSMo 2000. Southern Union did not institute this proceeding. Staff filed the Complaint. Moreover, Southern Union's Answer to Staff's Complaint is not a petition for declaratory judgment relief under Chapter 527 RSMo. The Answer contains an admission or denial with respect to each of Staff's allegations and, also, Southern Union's affirmative defenses.

- Staff puts significant reliance on the Missouri Court of Appeals decision in State ex. rel Fee Fee Trunk Sewer v. Litz, 596 S.W.2d 466 (Mo. App. 1980) as to the meaning of some of the language in §393.190 RSMo. The facts of that case are easily distinguishable from the circumstances presented in this case. In Fee Fee, the utility company sold its entire operating system **in Missouri** to the Metropolitan St. Louis Sewer District. The instant case deals with the sale of an operating division located **in Texas**. In the Fee Fee case, the sewer utility requested and obtained Commission approval for the sale. Consequently, there was no discussion in that case concerning the meaning of the phrase "franchise, works or system." The Court in that case did not make a specific determination

that the phrase "franchise, works or system" is interchangeable with the word "assets" because the Commission's jurisdiction was not an issue in that case. The General Assembly used carefully selected language in §393.190 RSMo. Had the General Assembly meant to say assets, it would have used the word "assets." Instead, it used the phrase "franchise, works or system." It must be presumed that those words were to be understood in their plain and ordinary sense. The Commission must look to the language in the statute that Staff alleges has been violated, not language appearing in wholly unrelated HVAC legislation.

7. When all the dust has settled, it is apparent that the filing of the Complaint was at best premature and ill-considered. Staff has not sufficiently apprised itself of the facts and circumstances of the sale by Southern Union of its operating division in Texas to support the conclusion that the whole or any part of Southern Union's franchise, works or system necessary or useful in the performance of its duties to MGE's customers was sold, assigned or transferred to ONEOK. Staff's continued inability to plainly articulate the factual basis for its Complaint is the proof.

8. To reiterate, Staff's Complaint fails to state a claim upon which relief may be granted. No part of Southern Union's franchise, works or system necessary or useful in the performance of its duties to the public in Missouri was sold or conveyed to ONEOK in connection with the sale of Southern Union's operating division in Texas, Southern Union Gas. MGE continues to provide natural gas service in those areas certificated to it by the Commission without impairment or interruption. The Complaint actually targets

reassignments of personnel or work responsibilities and/or contracts with third party vendors for the provision of routine services or business activities. Under well-recognized principles of Missouri law, all of these matters are reserved to the informed discretion of Southern Union's management team.

9. Staff has suggested that the Commission should schedule a technical conference in lieu of mediation of the Complaint.¹⁴ Unlike a voluntary mediation, being directed by the Commission to participate in a technical conference is not a process contemplated by or provided for in the Commission's practice rules governing procedure to be followed in complaint cases. Mandating participation in a technical conference while the Complaint is pending would interfere with Southern Union's due process rights to defend itself against Staff's allegations of unlawful conduct. Southern Union is not opposed, however, to cooperating with Staff in an industry-wide investigation of personnel reassignments by utilities or the performance of routine business activities by third party providers in the context of Case No. GO-2003-0354¹⁵, but only if the Complaint is first dismissed.

WHEREFORE, Southern Union renews its request that the Complaint be dismissed for failure to state a claim upon which relief can be granted and for lack of statutory authority for the Commission to authorize its General Counsel to seek statutory penalties for the conduct alleged.

¹⁴ Staff Response to Southern Union Company's Motion to Dismiss Complaint or for Referral to Voluntary Mediation, ¶ 14.

¹⁵ In the Matter of the Transfer of Assets, including much of Southern Union's Gas Supply Department to EnergyWorx, a wholly-owned subsidiary.

Respectfully submitted,



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Attorneys for Respondent Southern Union
Company d/b/a Missouri Gas Energy

CERTIFICATE OF SERVICE

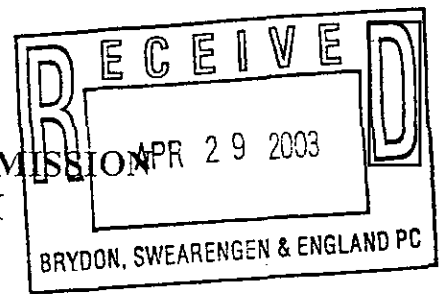
I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 27th day of May 2003 to the following:

Ms. Lera L. Shemwell
Office of the General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Douglas Micheel
Deputy Public Counsel
Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 7800
Jefferson City, MO 65102



BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI



In the Matter of Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions to be Reviewed in its 2000-2001 Actual Cost Adjustment)	<u>Case No. GR-2001-382</u>
In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Factors to be Reviewed in its 1999-2000 Actual Cost Adjustment)	<u>Case No. GR-2000-425</u>
In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Factors to be Reviewed in its 1998-1999 Actual Cost Adjustment)	<u>Case No. GR-99-304</u>
In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Tariff Revisions to be Reviewed in its 1997-1998 Actual Cost Adjustment)	<u>Case No. GR-98-167</u>

CONSOLIDATED
ISSUES LIST

COME NOW the Staff of the Public Service Commission of Missouri (Staff); Missouri Gas Energy, a division of Southern Union Company (MGE or Company); the Office of the Public Counsel (OPC); the City of Joplin; and, Riverside Pipeline Company, L.P., Mid-Kansas Partnership, Kansas Pipeline Company and (collectively KPC), and pursuant to the Commission's scheduling order in this case submit the following issues list:

1. MGE is entitled to recover in rates all prudently incurred gas costs. MGE owns long-term capacity on Kansas Pipeline Company, to meet customer demands but did not use it in the summer months of the 2000/2001 ACA period. Was MGE's decision not to post the KPC capacity for release, or alternatively, release equivalent

Williams capacity within the range of prudent behavior; and, if not, is \$858,158 an appropriate measure of economic harm?

2. MGE is entitled to recover all prudently incurred gas costs. Staff maintains that MGE should have hedged at a minimum s 30% of each winter month's normal—volumes; MGE maintains there was no hedging standard in place prior to the winter of 2000/2001but, regardless, hedged 38% of normal winter volumes. Was MGE's hedging conduct within the range of prudent behavior for the winter of 2000/2001; if not, is \$614,365 an appropriate measure of economic harm?

3. MGE is entitled to recover in rates all prudently incurred gas costs. MGE utilizes natural gas from first-of-month contract purchases, intra-month contract purchases and storage to meet its customers' heating season requirements. Was MGE prudent in its management of first-of-month and intra-month contract purchases and use of storage withdrawals; and, if not, is \$8,051,049 an appropriate measure of economic harm?

4. In July 2000, MGE filed an annual "Reliability Report" pursuant to a Commission order in a prior case. Staff reviewed the peak day and reliability information and the rationale for the reserve margin and has recommended in this case that the Commission order MGE to provide additional reliability information. Is this case an appropriate forum in which to consider the issue, and, if so, should the Commission order MGE to provide the requested reliability information?

The parties also suggest the following order of witnesses, and order of cross-examination:

MGE witnesses: Reed; Langston.

Order of Cross: KPC; Joplin; OPC; Staff.

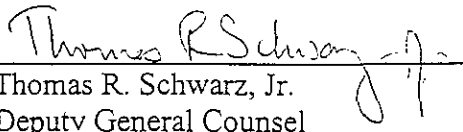
Staff witnesses: Herbert; Sommerer; Jenkins; Allee.

Order of Cross: Joplin; OPC; KPC; MGE

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ Thomas R. Schwarz, Jr.


Thomas R. Schwarz, Jr.
Deputy General Counsel
Missouri Bar No. 29645

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 29th day of April, 2003.

/s/ Thomas R. Schwarz, Jr.

