

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

**In the Matter of Missouri Gas Energy, a Division of)
Southern Union Company, Concerning a Natural)
Gas Incident at 910 West 48th Street in Kansas City,)
Missouri.)**

File No. GS-2013-0400

**HEARTLAND'S REPLY TO MGE'S OPPOSITION TO HEARTLAND'S
MOTION TO AUTHORIZE DEPOSITIONS OF MISSOURI
PUBLIC SERVICE COMMISSION STAFF MEMBERS**

COMES NOW Heartland Midwest, LLC ("Heartland"), by and through undersigned counsel, and hereby submits its Reply to MGE's Opposition to Heartland's Motion to Authorize Depositions of Missouri Public Service Commission ("MPSC") Staff. In support of its Reply, Heartland states as follows:

1. In its Opposition to Heartland's Motion to Authorize Depositions of MPSC Staff Members, MGE makes several unsupported conclusions regarding the potential risk created by an Order permitting the Staff to disclose information during Heartland's proposed depositions.
2. MGE argues that permitting the Staff to testify regarding their investigation and ensuing February 6, 2014 *Staff's Gas Incident Report* ("Report") would interfere with the Commission's ongoing investigation in File No. GC-2014-0216. (MGE's Opposition to Heartland's Motion, ¶ 6).
3. However, MGE offers no explanation or reasoning for how the Staff testimony regarding the investigatory process and resulting *Report* would interfere or otherwise impact the Commission's investigation in File No. GC-2014-0216.
4. MGE also contends that Heartland failed to offer specifics about the information sought in its proposed Staff depositions. (MGE's Opp., ¶ 7).

5. However, Heartland undeniably limited the scope of the proposed deposition testimony to include discussion of the procedure, process, and tools used and the information reviewed and analyzed by Staff in conducting their investigation in Case No. GS-2013-0400, as well as discussion of the Staff's investigatory findings and conclusions found in the *Report*. (Heartland's Motion to Authorize, ¶ 9(a-c)).
6. MGE asserts that Staff members will be called upon to testify about the ongoing discussions between MGE and the Commission regarding changes to MGE's policies and procedures. (MGE's Opp., ¶ 6 and 11).
7. Again, because such information would undoubtedly fall outside of the scope outlined in Heartland's Motion to Authorize Depositions, MGE's argument is without merit.
8. Ultimately, MGE's arguments regarding the alleged risks created by Heartland's proposed depositions are unpersuasive and do not discuss the factors considered by the Commission when reviewing a request for an order pursuant to R.S.Mo 386.480.
9. For these reasons, and those below, Heartland requests that the Commission grant Heartland's Motion to Authorize Depositions of MPSC Staff.

I. The Commission's balancing test for issuing orders pursuant to R.S.Mo 386.480 favors the Commission granting Heartland's Motion to Authorize Depositions.

10. As explained below, Heartland's Motion to Authorize the Depositions is proper under the Commission's balancing test for determining whether to issue an order pursuant to R.S.Mo 386.480.
11. MGE's Opposition to Heartland's Motion fails to address the factors considered by the Commission.
12. Therefore, the Commission should disregard MGE's Opposition to Heartland's Motion and grant Heartland's Motion to Authorize Depositions of MPSC Staff.

13. The Commission has long recognized the test for determining whether to issue an order pursuant to R.S.Mo 386.480:

In exercising its discretion, the Commission should consider the possibility of a constitutional right to privacy to be held by the regulated company or [other third parties involved]. This right to privacy must be balanced with the public's right to know. The case law indicates that three factors are generally considered in this balancing test. These are the intimacy of the material, the broadness of the issuance of the information and the wideness of the audience to which the information is released. *Office of the Public Counsel v. GTE Midwest Incorporated*, Order Granting Motion to Compel, Case No. TC-96-270 (November 1, 1996) (citations omitted).

14. In this case, the balancing test established by the Commission favors Heartland's Motion to Authorize Depositions to permit the Staff to disclose information as limited by Heartland in its Motion.

A. The public's right to know outweighs the constitutional right to privacy asserted by MGE or other third parties in this case.

15. MGE has not made, and cannot make, a sustainable argument that an Order permitting the Staff to discuss the limited topics specified in Heartland's Motion would violate MGE's constitutional right to privacy.
16. Further, no third parties have made claims regarding constitutionally protected privacy interests, nor would any such arguments be compelling.
17. During the course of its investigation in Case No. GS-2013-0400, the Commission spoke to a several individuals, many of whom are either parties or witnesses in the currently pending civil litigation.
18. A large majority of the individuals with whom the Commission spoke have filed lawsuits regarding the information contained in the *Report*.
19. In other words, many of the individuals involved in this incident knowingly and voluntarily waived their right to privacy regarding the facts concerning the February 19,

- 2013 explosion and fire, by filing a public action seeking damages because of the incident.
20. Of the limited other witnesses interviewed by the Commission who have not yet filed lawsuits, the majority have been deposed in one of the many civil actions surrounding the incident.
 21. Therefore, considering the breadth with which these issues are currently being litigated, very little information exists that could be protected by a legitimate claim of privacy.
 22. Furthermore, the public's right to know heavily outweighs potential privacy claims made by MGE or third parties.
 23. In Missouri, "[o]ur Sunshine Law and the counterpart statutes of the several states (the Federal Freedom of Information Act included) declare a common public policy in favor of open governmental meetings and records." *Hyde v. City of Columbia*, 637 S.W.2d 251, 262 (Mo. Ct. App. W.D. 1982).
 24. The civil litigation surrounding the February 19, 2013 explosion and fire at 910 W. 48th Street involves many individual members of the public, as well as several public business entities.
 25. The explosion and ensuing fire resulted in substantial property damage, a wide range of injuries to several individuals, and even a fatality.
 26. The public has a significant interest in seeing that the court system completely and accurately presents the issues to respective juries with a thorough knowledge of all relevant information. *See, e.g. State v. Tiger*, 972 S.W.2d 385, 389 (Mo. Ct. App. W.D. 1998) (stating, "the defendant's right to have his trial completed by a particular jury must be subrogated to the public's interest in fair trials designed to end it just

judgments.”) (citations omitted).

27. In addition, the civil litigation involves important issues of public safety regarding public utility services.
28. By permitting the Staff to disclose information received and reviewed during its investigation, the Commission ensures that the parties to the civil litigation have an opportunity to accurately present facts to the judiciary.
29. Because the Staff did not identify many of the individuals with whom they spoke, it is necessary for the Commission to authorize the Staff to disclose information otherwise prohibited by R.S.Mo 386.480.
30. For instance, the *Report* did not specify the identities of “MGE personnel” that told the Staff that MGE personnel never had contact with the Kansas City Fire Department (“KCFD”) prior to the explosion. *Report*, at p. 17:12–13.
31. However, the Staff also noted that the KCFD said “MGE personnel” told KCFD equipment was on the way and the situation was under control. *Report*, at p. 17:10–12.
32. Likewise, the Staff stated that they were “able to speak with individuals” who “reported smelling gas as early as 2:00pm on February 19, 2013,” but the Staff did not reveal these individuals’ identities. *Report*, at p. 25:20–22.
33. The Staff also spoke with “witnesses who walked near the southeast corner of the JJ’s Restaurant around 4:00pm [that] did not smell gas,” but again, the Staff did not identify these witnesses. *Report*, at p. 26:1–2.
34. The public, Heartland, and other parties to the civil litigation have a strong interest in ensuring that all witnesses with relevant information have been identified.
35. Permitting the Staff to disclose the names of the individuals with whom they spoke promotes both the public and Heartland’s interest in ensuring a full and fair litigation of

the numerous claims concerning this incident.

36. Because both the public and Heartland's interest in the Staff disclosing the information reviewed during its investigation outweighs any potential claims for privacy, Heartland requests that the Commission grant Heartland's Motion to Authorize Depositions of MPSC Staff.

B. The information sought by Heartland is not intimate in nature.

37. Heartland seeks information from the Staff related to the documents, records, and testimony they reviewed in conducting their investigation that led to the *Report*.
38. Unexplainably, MGE consistently warns the Commission that an Order permitting the Staff to discuss the topics proposed by Heartland will necessarily entail discussion of the ongoing relationship between MGE and the Commission.
39. MGE's assertion that the Staff will be called to testify about recent policy and procedure changes within MGE is baseless; such information plainly falls outside of the scope proposed by Heartland.
40. Additionally, the Commission is clearly within its power to authorize the Staff to discuss the limited topics as proposed by Heartland and to prohibit the Staff from discussing other issues. R.S.Mo 386.480.
41. That R.S.Mo 386.480 authorizes the Commission to issue an order permitting the Staff to disclose otherwise statutorily-prohibited information is evidence that not all information provided by a utility to the Commission is worthy of the statutory protection MGE attempts to invoke.
42. Pursuant to R.S.Mo 386.480, Heartland specifically limited the scope of its proposed deposition examination to topics centered on the *Report* to minimize the possibility of

the Staff disclosing inappropriate information. See also, Section D., *infra*.

43. Even if the information sought by Heartland were intimate, which it is not, the disclosed information would still be subject to a protective order. See also, Section D., *infra*.
44. Because the information sought by Heartland is not intimate in nature and is sufficiently narrowed by Heartland's proposed scope, Heartland requests that the Commission grant its Motion to Authorize Depositions of MPSC Staff.

C. The information to be disclosed pursuant to Heartland's request is not broad.

45. In its Motion to Authorize Depositions, Heartland limited the scope of its request to include authorization for the Staff to discuss the following information:
 - a. Discussion of the procedure, process, and tools used and the information reviewed and analyzed by the staff members in conducting their investigation in Case No. GS-2013-0400;
 - b. Discussion of the staff member's investigatory findings and conclusions in Case No. GS-2013-0400; and
 - c. Discussion of the February 6, 2014 *Staff's Gas Incident Report* in Case No. GS-2013-0400.
46. MGE repeatedly asserts that Heartland has no right to discovery concerning settlement discussions between the Staff and MGE (MGE's Opp., ¶ 4 and 7) and that "Heartland's offer to limit the scope of the depositions is really no limit at all." (MGE's Opp., Sec. C).
47. At the same time, MGE argues that permitting the Staff to testify would be unfair to MGE because Heartland would be limited to questioning the Staff about the *Report* without discussing the Staff's current opinions given additional information they have

now reviewed. (MGE's Opp., ¶ 12).

48. MGE's arguments cannot co-exist. Either the proposed scope is too broad or unfairly narrow, but it cannot be both.
49. Heartland does not contest MGE's assertion that Heartland has no right to discovery concerning settlement discussions between MGE and the Staff.
50. Heartland does not seek, and has not requested authority to inquire about, information related to settlement discussions between MGE and the Staff.
51. Rather, Heartland has requested that the Commission authorize the Staff to discuss the investigation that led to the *Report*, not information reviewed since the *Report*.
52. MGE argues that both the over-breadth and the narrowness of the request create significant risk of interfering with the Staff's ongoing investigation in GC-2014-0216.
53. However, because MGE provides no reasoning or support for how Staff testimony regarding the *Report* would interfere with or prejudice the ongoing investigation, the Commission should disregard MGE's Opposition to Heartland's Motion.
54. An order permitting the Staff to disclose the proposed information in no way interferes with the Staff's ability to conduct its investigation in File No. GC-2014-0216.
55. Because Heartland has appropriately limited the scope of the proposed depositions, and because the information sought by Heartland is not broad in scope, Heartland requests that the Commission grant its Motion to Authorize Depositions of MPSC Staff.

D. Because the proposed depositions are subject to the Court's Protective Order, the information will not be released to a wide audience.

56. The civil litigation involving the February 19, 2013 explosion and fire is subject to a broad Protective Order entered by the Court on November 1, 2013. (Attachment A).
57. The Protective Order prevent parties from making unauthorized disclosures of

confidential documents and information.

58. Heartland has fully abided by the Court's Protective Order, and MGE has no basis to assert that either Heartland or any other party would violate the Court's order with regard to information disclosed during the proposed Staff-member depositions.
59. Additionally, the complex litigation surrounding the incident has been assigned a special master to oversee much of the pretrial activity amongst the parties, including discovery and adherence to the Protective Order.
60. Because the discovery in the civil litigation is governed by a Protective Order, which is enforced in part by a special master, the information sought by Heartland will not have a wide audience.
61. Because the audience will not be wide, Heartland requests that the Commission grant its Motion to Authorize Depositions of MPSC Staff.

II. Permitting Staff members to testify will not cause the harm alleged by MGE.

62. As stated above, MGE makes several unsupported conclusions about the potential risks created by permitting the Staff to disclose information related to the *Report*.
63. For instance, MGE stated that the Commission "acknowledged the legitimacy of MGE's concerns about the risks of parallel civil and administrative proceedings." (MGE's Opposition, ¶ 5(e)).
64. The Commission did not do so, and MGE's characterization of the Commission's April 2, 2014 Order in File No. GC-2014-0216 is inaccurate, at best.
65. Rather, the Commission acknowledged MGE's contention that "the civil discovery process will uncover much more information than Staff has been able to reveal in its more limited investigation." *Staff of the Missouri Public Service Commission v. Laclede*

Gas Co. et al., Order Regarding Motion to Dismiss at *3, File No. GC-2014-0216 (April 2, 2014).

66. The Commission made no acknowledgement, or even mention, of potential risk of parallel proceedings.
67. MGE also argues that permitting the Staff to testify will create confusion between the proceedings before the Commission and the civil litigation. (MGE's Opp., ¶ 1).
68. MGE's allegation of confusion is similarly unsupported in its Opposition to Heartland's Motion.
69. It should be noted, however, that on November 6, 2014, the Staff submitted its Recommendation to Approve Heartland's Motion, suggesting that the Staff itself suffers from no confusion related to the separation of the proceedings.
70. MGE suggests that Heartland's proposed depositions are meant to interfere with ongoing investigation because Heartland "trumpeted the report in its pleadings and to the media" to "deflect blame to MGE." (MGE's Opp., ¶ 2).
71. Heartland did not, and had no need to, "trumpet" the *Report* to the media – the media have followed this case very closely since its inception and were capable of locating the publicly-available *Report*.
72. Heartland merely stated that the detailed and thorough *Report* supported Heartland's case, which is not improper.
73. Coincidentally, despite MGE's present claims of interference, MGE had no qualms about making public statements related to Heartland's involvement immediately after the incident occurred, before a lengthy and thorough investigation had been completed. *See, e.g., Kevin Murphy, Severed underground gas pipe led to fatal Kansas City*

explosion, Chicago Tribune, (February 20, 2013)

http://articles.chicagotribune.com/2013-02-20/news/sns-rt-us-usa-blast-kansascitybre91j030-20130219_1_blast-and-fire-natural-gas-explosion.

74. Finally, MGE asserts that “questioning Staff about an ongoing investigation is never proper.” (MGE’s Opp., ¶ 11).
75. Heartland has not requested authorization to question the Staff about an ongoing investigation.
76. Rather, Heartland seeks to question the Staff about its *Report* in Case No. GS-2014-0400, which, MGE admits, was closed by the Commission’s Order on February 19, 2014. (MGE’s Opp., ¶ 5(c)).
77. MGE cannot provide support for any of its arguments alleging that an Order from the Commission authorizing the Staff to disclose information related to the *Report* will interfere with either the Commission’s ongoing investigation or the ongoing civil litigation.

III. Conclusion

78. In sum, the balancing test established by the Commission for determining whether to issue an order pursuant to R.S.Mo 386.480 heavily favors Heartland’s Motion to Authorize Depositions of MPSC Staff.
79. MGE has provided no support for its allegations that the proposed depositions will cause interference with the Commission and the Staff.
80. Furthermore, MGE has provided no support that tilts the Commission’s established balancing test in MGE’s favor, and thus, the balance is in favor of Heartland’s Motion.

WHEREFORE, Heartland requests that the Missouri Public Service Commission issue an order authorizing staff members Richard A. Fennel, Robert R. Leonberger, and Mark Struckhoff to be deposed and furnish such information as otherwise prohibited by R.S.Mo § 386.480, within the scope of examination as provided in Heartland's Motion to Authorize Depositions of Missouri Public Service Commission Staff Members and for other such relief as the Commission deems proper.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of November, 2014, the foregoing was filed electronically with the Missouri Public Service Commission Electronic Filing and Information System (EFIS). Additionally, true and correct copies have been sent via US Mail to the following:

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***Attorney for the Staff of the Missouri
Public Service Commission***


Attorney

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

LINDSAY SIMMONS,)	
)	
Plaintiff,)	
v.)	Division No. 10
)	Case No. 1316-CV07265
SOUTHERN UNION COMPANY, et al.,)	
)	
Defendants.)	

MICHAEL TANNER, et al.,)	
)	
Plaintiffs,)	
v.)	Division No. 15
)	Case No. 1316-CV09906
SOUTHERN UNION COMPANY, et al.,)	
)	
Defendants.)	

J.J.'s BAR AND GRILL, et al.,)	
)	
Plaintiffs,)	
v.)	Division No. 3
)	Case No. 1316-CV11288
SOUTHERN UNION COMPANY, et al.,)	
)	
Defendants.)	

AARON MEEK, et al.,)	
)	
Plaintiffs,)	
v.)	Division No. 10
)	Case No. 1316-CV13523
SOUTHERN UNION COMPANY, et al.,)	
)	
Defendants.)	

CARTER M. CRAMER, et al.,)
)
Plaintiffs,)
v.)
)
SOUTHERN UNION COMPANY, et al.,)
)
Defendants.)

Division No. 10
Case No. 1316-CV13738

PLAZAVIEW, LLC,)
)
Plaintiff,)
v.)
)
SOUTHERN UNION COMPANY, et al.,)
)
Defendants.)

Division No. 14
Case No. 1316-CV16817

PATRICK WOODWARD,)
)
Plaintiff,)
v.)
)
SOUTHERN UNION COMPANY, et al.,)
)
Defendants.)

Division No. 1
Case No. 1316-CV22020

DR. STEVEN C. MINGOS AND)
ASSOCIATES, LLC, et al.,)
)
Plaintiffs,)
v.)
)
SOUTHERN UNION COMPANY, et al.,)
)
Defendants.)

Division No. 10
Case No. 1316-CV18072

MICHAEL A. PALIER,)
)
 Plaintiff,)
 v.) Division No. 15
) Case No. 1316-CV18684
 HEARTLAND MIDWEST, LLC, et al.,)
)
 Defendants.)

MATTHEW COUTURE, et al.,)
)
 Plaintiffs,)
 v.) Division No. 1
) Case No. 1316-CV18787
 SOUTHERN UNION COMPANY, et al.,)
)
 Defendants.)

PROTECTIVE ORDER

Upon consideration of the applications of the parties for a protective order regarding material and information that is deemed confidential pursuant to Rule 56.01, it is hereby **ORDERED** as follows:

1. Any party who seeks to protect documents claimed as confidential under Rule 56.01 must designate any such documents as confidential at the time of production and state the basis for designating such documents as confidential at the time such documents are produced.
2. Upon receipt of the documents which are marked or designated as confidential, the party receiving such documents shall advise the producing party within twenty (20) days of receipt if they object to having the documents designated as confidential. If the parties cannot thereafter resolve the issue as to whether the documents have been properly designated as confidential within five (5) days

thereafter, any other party may within ten (10) days file an objection to the designation. If such objection is filed, the Court or Special Master will rule, subject to all rights of appeal, whether the documents are confidential or not. If ruled not confidential, the producing party will produce additional clean copies without any confidential designations. Otherwise, the confidential designation will remain.

3. Late designations or objections to the designation of confidentiality may be considered by the Court or Special Master, but the failure to timely designate or object may be considered by the Court or Special master as a factor in upholding or overruling the designation. All designations of confidentiality or objections to such designations shall be served on all parties to any of the JJ's litigation matters.
4. Confidential materials may be disclosed without further written agreement to:
 - a. Parties to any of the JJ's litigation matters and their insurance carriers;
 - b. Employees of parties to any of the JJ's litigation matters;
 - c. Counsel for parties to any of the JJ's litigation matters;
 - d. Employees of counsel for parties to any of the JJ's litigation matters;
 - e. Court reporters or videographers recording any proceedings in any of the JJ's litigation matters;
 - f. Witnesses at trial or deposition in any of the JJ's litigation matters;
 - g. Attorneys representing any witnesses in any of the JJ's litigation matters;
 - h. Court personnel in any of the JJ's litigation matters;

- i. Any governmental agency that is conducting an investigation of the incident that is the basis of this litigation, including but not limited to the Missouri Public Service Commission, the U.S. Occupational Health and Safety Administration, and the staff and attorneys of such agencies;
- j. Copying or scanning services

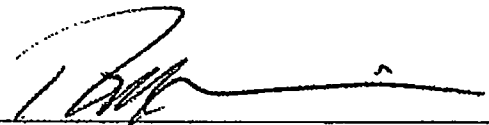
Confidential materials may be disclosed **only upon written agreement** to abide by this Protective Order to:

- k. Consultants or experts retained by parties or their counsel in any of the JJ's litigation matters
 - l. Arbitrators or mediators in any of the JJ's litigation matters
5. Any person receiving confidential documents and testimony will use those materials only for the purposes of the JJ's litigation, and will take reasonable measures to ensure that they are not disclosed to anyone other than those persons to whom confidential documents and testimony may be disclosed as defined in this Protective Order. Such reasonable measures will include consideration of how confidential materials are treated if used as exhibits to court papers or depositions or topics of examination during testimony. All parties to the litigation will cooperate in such measures.
6. Upon conclusion of any party's role in the JJ's litigation who has received confidential materials, they shall return all such materials to the producing party or certify to the producing party that all such materials have been destroyed or maintained by counsel in accordance with the terms of this Protective Order and ethical rules related to the maintenance of attorney files

7. Designation of documents or testimony as confidential (or the failure to so designate) has no effect on any privileges or objections related to discovery of such materials or information.

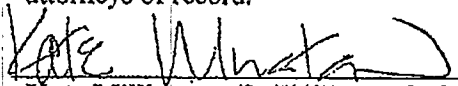
IT IS SO ORDERED.

11/1/13
Date


Robert M. Schieber, Circuit Judge

Certificate of Service

Copies emailed/faxed/sent through the efilng system this 11/1/13 to the attorneys of record.


Kate Millington, Bailiff/Law Clerk