

**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 APPLICATION FOR REHEARING

COMES NOW Heartland Midwest, LLC ("Heartland"), by and through undersigned counsel, and, pursuant to § 386.500 RSMo, 4 CSR 240-2.080, and 4 CSR 240-2.160, hereby submits its Application for Rehearing. In support of its Application, Heartland states as follows:

1. On November 12, 2014, the Missouri Public Service Commission ("Commission") issued an Order Regarding Heartland Midwest's Motion to Authorize Depositions of Commission Staff Members. The Order states that the Commission will not allow its Staff to disclose any information otherwise protected from disclosure under § 386.480 RSMo during the depositions proposed by Heartland Midwest ("Heartland").
2. Heartland respectfully requests that the Commission rehear this matter and thereafter revoke and rescind its Order Regarding Heartland's Motion because it is unjust, unreasonable, and hampers Heartland's ability to fully defend its interests in pending civil litigation.
3. Upon rehearing, Heartland respectfully requests that the Commission grant Heartland's Motion to Authorize Depositions of Staff Members.
4. Pursuant to § 386.480, Staff members are prohibited from disclosing information provided to them by a corporation, person, or public utility unless otherwise authorized by the Commission.
5. On October 30, 2014, Heartland filed a Motion asking the Commission to authorize

three Staff members to disclose information that was provided to them during their investigation which led to the February 6, 2014 *Staff's Gas Incident Report* ("Report") in File No. GS-2013-0400.

6. On November 6, 2014, the Staff filed a response to Heartland's Motion, recommending that the Commission grant Heartland's Motion.
7. Also on November 6, 2014, Laclede Gas Co. d/b/a/ Missouri Gas Energy ("MGE") responded to Heartland's Motion, opposing the disclosure of information furnished to the Commission by MGE.
8. On November 11, 2014, Heartland filed its Reply to MGE's Opposition.
9. On November 12, 2014, MGE filed its Sur-Reply to Heartland's Reply.
10. In its November 12 Order, the Commission's only stated reason for denying Heartland's Motion was because "the Commission's Staff needs to be able to rely on the willingness of the utility and other parties to disclose information to Staff without the apprehension that it will later be disclosed to third parties."
11. However, the Order does not address the factors considered by the Commission when determining to issue an order pursuant to RSMo § 386.480.

I. The established balancing test for issuing orders pursuant to § 386.480 RSMo weighs in favor of granting Heartland's Motion.

12. In determining whether to issue an order pursuant to RSMo § 386.480:

[T]he 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).

13. As explained further below, Heartland's Motion should be granted under the Commission's balancing test because the factors weigh heavily in Heartland's favor.

A. Because neither MGE nor any other third party has made a claim for constitutional privacy, the public's right to know is paramount.

14. The February 19, 2013 explosion and fire at 910 W. 48th Street resulted in substantial property damage, a wide range of injuries to several individuals, and even a fatality.
15. The subsequent litigation surrounding the incident involves many individual members of the public, as well as a number of Missouri business entities.
16. In Missouri, the public has a significant interest in seeing that the court system completely and accurately presents issues to 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) (explaining the public's interest in fair trials designed to end it just judgments).
17. Pursuant to the incident, the Commission directed its Staff to begin an investigation and conduct a report.
18. In their ensuing *Report*, the Staff did not identify many of the individuals with whom they spoke; many individuals were identified only by their employer and position of employment.
19. Because the Staff did not specifically identify many witnesses whose knowledge may be material to issues in the civil litigation, as well as many documents that were reviewed, Heartland must depose the Staff members to ensure that it has identified relevant witnesses and documents.
20. Without the unrestricted testimony of the Staff members, Heartland (and the public) will be unable to verify if all of the relevant information has been identified during the civil discovery process.

21. MGE has not made, nor has any third party, an argument that an Order permitting the Staff to discuss the information provided to them would violate any constitutional privacy rights.
22. By permitting the Staff to disclose information received and reviewed during its investigation, the Commission ensures that the public's interest in an informed judiciary, capable of making just decisions, is met.
23. The public's interest in ensuring that the court is fully apprised of all of the relevant information surrounding the incident is paramount to any privacy concerns, especially when none have been asserted.
24. Therefore, Heartland requests that the Commission revoke and rescind its Order and grant Heartland's Motion to Authorize Depositions.

B. The information sought by Heartland has been the subject of prolonged civil litigation and is not intimate in nature.

25. Parties have been engaged in civil litigation surrounding the February 19, 2013 incident for well over a year, and the first of many jury trials is not scheduled until July 2015.
26. The parties have also engaged in extensive discovery, including taking the depositions of well over 100 individuals.
27. In its Motion to Authorize Depositions, Heartland seeks permission for the Staff to disclose information the Staff reviewed in conducting their investigation that led to the *Report* so that Heartland can confirm the identity of critical witnesses and ensure that all relevant information has been provided in the discovery process.
28. MGE itself admitted that much of the information reviewed by the Staff is largely based on the information disclosed in the civil discovery process (MGE's Opp., ¶ 8), but fell short of confirming that all the information provided to the Commission has been

provided in the civil litigation.

29. To ensure that Heartland has identified all relevant witnesses and sources of information, the Staff must be permitted to disclose the information provided to them during their investigation.
30. Preventing Heartland from conducting full, pre-trial discovery is contrary to the policy established by Missouri's highest court. *See, State ex rel. State v. Riley*, 992 S.W.2d 195, 197 (Mo. 1999) ("Pre-trial discovery performs important and legitimate functions. The benefits are numerous: liberal discovery aids in the ascertainment of truth, early disclosure promotes early settlement, surprise is eliminated, issues are narrowed, trial preparation is facilitated, and 'relevant' information is obtained.") (citations omitted).
31. As mentioned in Section D., *infra*, the Court's Protective Order in this case should assuage any concerns by the Commission that the information sought by Heartland is too intimate for disclosure.
32. No one outside the litigation will learn of the information disclosed by the Staff.
33. If the Commission is concerned about the potential for disclosure outside the litigation, the Court can be moved to seal the Staff depositions, and pursuant to Supreme Court Rule 4.24(1)(r), such depositions would remain confidential.¹
34. Therefore, because the information sought by Heartland is not intimate in nature, the Commission should revoke and rescind its Order and grant Heartland's Motion to Authorize Depositions.

¹ Heartland in no way concedes that the Court's Protective Order is insufficient to keep the proposed information confidential without sealing the depositions. Sealing the proposed depositions is a procedural option above and beyond what Heartland believes is more than sufficient confidentiality assurance in the Court's Protective Order.

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

35. 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.
36. Heartland has not sought discovery concerning settlement discussions between MGE and the Staff; nor has Heartland sought discovery of additional information provided to the Commission subsequent to the *Report*.
37. Rather, Heartland has requested that the Commission authorize the Staff to discuss information that led to the *Report*, not information regarding an ongoing investigation.
38. Heartland's request does not interfere with an ongoing investigation because Heartland seeks to question the Staff about their past investigation, in an admittedly-closed File No. GS-2013-0400. (MGE's Opp., ¶ 5(c)).
39. MGE has argued that permitting the Staff to disclose information would force MGE to treat future Commission information requests with the same legal caution it treats civil discovery. (MGE's Opp., ¶ C).
40. Certainly MGE is not suggesting that an order from the Commission permitting the Staff to disclose information would motivate MGE to intentionally withhold relevant

information from either the Commission during an ongoing investigation or parties and the court during the discovery process.

41. As MGE is surely aware, MGE is obliged, both by the Supreme Court of Missouri and the Commission, to cooperate fully and openly with discovery and investigations.
42. Missouri Supreme Court Rule 61.01 describes potential actions that may be taken by the court as penalties for failing to comply with discovery in civil litigation, including awarding attorneys' fees, excluding evidence, striking pleadings, dismissing actions, and rendering default judgments.
43. Likewise, pursuant to § 393.140 RSMo, the Commission has general supervision over utility companies, like MGE, with the authority to inspect the utility's accounts, books, contracts, records, documents, etc., as well as compel the production of the same. RSMo § 393.140(1); (7-9).
44. Regardless of whether the Commission permits the Staff to disclose information, MGE is obligated to cooperate and openly answer requests for information, whether in a Commission investigation or a civil lawsuit.
45. Authorizing the Staff to disclose information in no way prevents MGE from meeting its obligations to be honest, forthright, and open with the Commission and its investigators during any investigation.
46. To the extent the Staff may be permitted to disclose information, such permission will come from the Commission, who is clearly within its authority to limit the breadth of information disclosed.
47. Because the scope of Heartland's proposed depositions is not broad, Heartland requests that the Commission revoke and rescind its Order and grant Heartland's Motion to

Authorize Depositions.

D. The Court's Protective Order will ensure that the information disclosed during the proposed depositions will not be released to a wide audience.

48. The civil litigation surrounding the February 19, 2013 incident is subject to a broad Protective Order entered by the Court on November 1, 2013. (Attachment A to Heartland's Reply to MGE's Opposition).
49. The Protective Order prevent parties from making unauthorized disclosures of confidential documents and information.
50. Heartland has abided by, and will continue to abide by, the Court's Protective Order in this case.
51. The complex litigation concerning the incident has also been assigned a special master to oversee much of the pretrial activity among the parties, including discovery and adherence to the Protective Order.
52. 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.
53. Because the audience will not be wide, Heartland requests that the Commission revoke and rescind its Order and grant Heartland's Motion to Authorize Depositions.

II. Permitting Staff members to disclose information provided to them will not cause apprehension among other parties because any disclosure made by the Staff is permissible only pursuant to the Commission's order.

54. As mentioned above, the Commission's only stated reason for denying Heartland's Motion is because the "Staff needs to be able to rely on the willingness of the utility and other parties to disclose information to Staff without the apprehension that it will later be disclosed to third parties."

55. The Commission's concern that Staff disclosures in this case will cause apprehension among other parties is unjust and unreasonable.
56. Pursuant to § 386.480 RSMo, Staff members are prohibited from disclosing information provided to them by a corporation, person, or public utility; only upon an order from the Commission can the Staff disclose such information.
57. That § 386.480 RSMo authorizes the Commission to issue an order permitting the Staff to disclose otherwise prohibited information is evidence that not all information provided to the Staff should be free from disclosure.
58. The existence of a procedure for disclosing information suggests that the legislature's intent was to permit disclosure of information provided to the Commission upon a proper showing.
59. Indeed, for this reason the Commission has established a balancing test for determining whether to issue an order pursuant to § 386.480 RSMo.
60. Neither the Commission nor MGE has addressed the factors established by the Commission.
61. In addressing the factors established by the Commission, Heartland has made the necessary showing to warrant an Order from the Commission granting the Staff authorization to make the requested disclosures.
62. Permitting the Staff to disclose information reviewed in creating the *Report* will not cause other parties any additional apprehension than such parties should have otherwise.
63. In other words, it is always the case that information provided to the Staff may be disclosed by the Staff at a later date upon an order from the Commission pursuant to § 386.480 RSMo.

64. In this case, as in all others, the Staff would only be permitted to disclose information after receiving authorization from the Commission.
65. MGE was given a full and fair opportunity to respond to Heartland's Motion and to present its arguments for why the Commission should deny Heartland's Motion; other parties will have the same opportunity.
66. Permitting disclosure will not cause other parties apprehension simply because the Commission exercised its statutory authority to allow the Staff to discuss information provided to them.
67. Therefore, because § 386.480 RSMo specifically envisions a scenario in which information provided to the Commission is subsequently disclosed pursuant to Commission order, the stated reason for denying Heartland's Motion is unjust and unreasonable.

III. Conclusion

68. The Commission's Order prohibiting the Staff from disclosing information fails to address the balancing test factors that are to be considered by the Commission when issuing an order pursuant to § 386.480 RSMo.
69. The factors for determining whether to issue an order pursuant to § 386.480 RSMo weigh heavily in favor of granting Heartland's Motion.
70. There is no evidence in this case to suggest that permitting disclosure will cause interference with the ongoing or future operation of the Commission or the Staff.
71. Furthermore, the Commission's stated reason for denying Heartland's Motion is unjust and unreasonable; it is not supported by reasoning or argument and must be revoked and rescinded.

72. Missouri law clearly permits the Commission to authorize Staff disclosures and doing so in no way invalidates or weakens the statutory protection granted under § 386.480 RSMo.

WHEREFORE, Heartland requests that the Missouri Public Service Commission rehear Heartland's Motion to Authorize Depositions, revoke and rescind its November 12 Order regarding the same, and 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 § 386.480 RSMo, 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,



Bradley S. Russell #39392
Jeffrey C. Baker #50266
Tyler C. Hibler #61317
Joe M. McGreevy #65028
SANDERS WARREN & RUSSELL LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, KS 66210
Phone: 913-234-6100; Fax: 913-234-6199
b.russell@swrllp.com
jc.baker@swrllp.com
t.hibler@swrllp.com
j.mcgreevy@swrllp.com
Attorneys for Heartland Midwest, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 21st 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:

Rick Zucker
Associate General Counsel
Laclede Gas Company
Doing Business as MGE
720 Olive Street
St. Louis, Missouri 63101
rick.zucker@thelacledegroup.com

David R. Schlee
Vincent R. McCarthy
Truman K. Eldridge, Jr.
Daniel A. Young
Michael P. Schaefer
Kathryn A. Regier
SCHLEE HUBER McMULLEN & KRAUSE, PC
PO Box 32430
4050 Pennsylvania, Suite 300
Kansas City, MO 64171-5430
Telephone: 816-931-3500
Facsimile: 816-931-3553
drschlee@schleehuber.com
vmccarthy@schleehuber.com
teldridge@schleehuber.com
dyoung@schleehuber.com
mschaefer@schleehuber.com
kregier@schleehuber.com
Attorneys for Southern Union Company, d/b/a Missouri Gas Energy

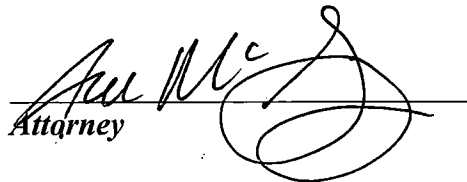
Marc D. Poston
Dustin Allison
Deputy Public Counsel
The Office of Public Counsel
Governor Office Bldg., Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230
Telephone: 573-751-5558
Facsimile: 573-751-5562
Office of the Public Counsel

marc.poston@ded.mo.gov
opcservice@ded.mo.gov
Sharon Delaney
Missouri Public Service Commission
Office of Chief Staff Counsel
(573) 751-4873
(573) 751-9285 (Fax)
sharon.delaney@psc.mo.gov

Kevin A. Thompson
John Bormeyer
P.O. Box 350
Jefferson City, Missouri 65102
Telephone: 573-751-6514
Facsimile: 573-526-6969
kevin.thompson@psc.mo.gov
john.borgmeyer@psc.mo.gov
***Attorney for the Staff of the Missouri
Public Service Commission***

Bob Berlin
200 Madison St., Ste. 800
P.O. Box 360
Jefferson City, MO 65102
bob.berlin@psc.mo.gov
Missouri Public Service Commission

Todd J. Jacobs
Michael D. Smith
3420 Broadway
Kansas City, MO 64111
Attorneys for Missouri Gas Energy (Laclede)


Attorney