

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office  
in Jefferson City on the 9<sup>th</sup>  
day of May, 2012.

Superior Bowen Asphalt Company, LLC,	)	
	)	
Complainant,	)	
	)	
vs.	)	File No. GC-2011-0101
	)	
Southern Union Company d/b/a	)	
Missouri Gas Energy,	)	
	)	
Respondent.	)	

**CONSENT ORDER AND DISMISSAL WITH PREJUDICE**

Issue Date: May 9, 2012

Effective Date: May 19, 2012

The Missouri Public Service Commission is:

- Approving the disposition of this action by settlement because such disposition is in the public interest;
- Incorporating the *Amended Non-Unanimous Stipulation and Agreement's* terms into this order; and
- Granting Superior Bowen leave to voluntarily dismiss the complaint with prejudice.

The complaint charges that Southern Union committed tariff, regulatory, and statutory violations by collecting an amount from Superior Bowen for the improvement of Southern Union's gas delivery system. The complaint's merits are not the subject of

this order and this order does not determine whether any violation of statute, tariff, or Commission regulation or order occurred.

### **1. Background, Jurisdiction, and Authority**

Superior Bowen Asphalt Company, LLC (“Superior Bowen”) filed the complaint<sup>1</sup> against Southern Union Company, d/b/a Missouri Gas Energy (“Southern Union”). Southern Union filed an answer.<sup>2</sup> Staff filed a recommendation.<sup>3</sup> Superior Bowen, Southern Union, and Staff, (“signatories”) filed an *Amended Non-Unanimous Stipulation and Agreement* (“Amended Agreement”).<sup>4</sup> The Office of the Public Counsel (“OPC”) is not a signatory.<sup>5</sup>

Because the Commission is a creature of statute, the statutes determine the Commission’s jurisdiction and authority. The Commission’s jurisdiction includes gas companies, which includes Southern Union. The Commission’s duties include hearing a complaint that charges unjust, unreasonable, or unlawful business conduct and ordering a remedy.<sup>6</sup>

The Commission issued notice of a contested case,<sup>7</sup> which is a formal hearing procedure. But contested case procedure allows for a waiver of pre-decision procedural formalities,<sup>8</sup> including waiver of an evidentiary hearing.<sup>9</sup> Contested case procedure also

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<sup>1</sup> On October 7, 2010.

<sup>2</sup> On November 22, 2010.

<sup>3</sup> On February 25, 2011.

<sup>4</sup> On April 26, 2012. The Amended Agreement supersedes the *Non-Unanimous Stipulation and Agreement*, which the signatories filed on April 2.

<sup>5</sup> OPC is a party to this action under 4 CSR 240-2.010(10).

<sup>6</sup> Section 393.140, RSMo 2000.

<sup>7</sup> On October 21, 2010.

<sup>8</sup> Sections 536.060(3) and 536.063(3), RSMo 2000.

<sup>9</sup> Sections 536.060, RSMo 2000.

allows for a decision without separately stated findings of fact when a stipulation, consent order, or agreed settlement disposes of the case.<sup>10</sup>

The Amended Agreement waives procedural requirements that would otherwise be necessary before final decision, including evidentiary hearing. The signatories stipulate to certain facts and agree to enter into the record the complaint, the answer, and the recommendation. The Commission will grant that request.

The Commission received no objection to the Amended Agreement within the time set by regulation.<sup>11</sup> That regulation provides that the Commission may now treat the Amended Agreement as unanimous. The Amended Agreement disposes of the case, so the Commission need not separately state its findings of fact.

## **2. Pleadings and Settlement**

Superior Bowen's complaint claims that Southern Union charged the disputed amount, based on Superior Bowen's new equipment, but such charge is unsupported by tariff and contrary to statutes and regulation. Southern Union's answer defends the disputed amount by citing tariff provisions related to new customer equipment requiring upgrades to Southern Union's delivery system. Staff's report states that the merits of the claim and defense depend on the pressure needed to service the new equipment—a quantity not known to Staff.

The Amended Agreement sets forth, as to the disputed amount, the:

- Position of Superior Bowen;
- Position of Southern Union; and
- Settlement terms of the signatories.

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<sup>10</sup> Section 536.090, RSMo 2000, and 4 CSR 240-2.115.

<sup>11</sup> 4 CSR 240-2.115(2)(B).

Those settlement terms include the:

- Disposition of the disputed amount;
- Signatories' commitment to positions in future actions; and
- Release of related actions.

The Amended Agreement does not include a stipulation as to whether a violation occurred, and does not seek any pre-judgment of rate-making treatment for any item.

The Amended Agreement seeks relief in various forms as follows:

Signatories respectfully request that the Commission issue its Order approving and incorporating the terms of this Amended Non-Unanimous Stipulation and Agreement and dismissing this Complaint with prejudice.<sup>[12]</sup>

(Emphasis added.)

### **3. Rulings**

As to those requests, based on the record, the Commission independently finds and concludes as follows.<sup>13</sup>

#### *a. Approving*

The signatories seek approval for their settlement of the complaint.<sup>14</sup> The statutes governing complaints before the Commission show that the disposition of every complaint is subject to the Commission's determination of the public interest. That is because of the nature of complaint procedure as follows.

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<sup>12</sup> Amended Agreement, page 6, full paragraph.

<sup>13</sup> Section 386.420.2, RSMo 2000.

<sup>14</sup> The Commission does not construe that request as seeking a decision on the merits because a conclusion that no violation exists would negate any basis for relief.

A complaint before the Commission always involves interests beyond those of complainant and respondent. The elements of a complaint do not include damage to complainant:

The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant[.<sup>15</sup>]

But the elements of a complaint always include a violation of statute, tariff, or Commission regulation or order:

Complaint may be made by the commission of its own motion, or by [other entities] in writing, setting forth any [conduct of] any . . . public utility . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.<sup>16</sup>]

Thus, generally, a complaint always implicates the public interest.

Specifically, the instant complaint's allegations are expressly subject to the public interest standard because they address the financing of a supply line upgrade:

The commission shall:

\*       \*       \*

(2) . . . examine or investigate the methods employed [for] distributing and supplying gas . . . and in transmitting the same, . . . and have power to order such reasonable improvements as will best promote the public interest . . . , and have power to order reasonable improvements and extensions of the works[,] pipes, lines, . . . and other reasonable devices, apparatus and property of gas corporations[.<sup>17</sup>]

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<sup>15</sup> Section 386.390.3, RSMo 2000.

<sup>16</sup> Section 386.390.1, RSMo 2000.

<sup>17</sup> Section 393.140, RSMo 2000.

Partly for that reason, Staff and OPC are parties to this action<sup>18</sup> so that—whatever complainant and respondent decide—an advocate for the public interest remains. And the statutes already cited require the Commission to decide, by exercising sound discretion, what is ultimately in the public interest.

The public interest is plainly less urgent in an isolated billing dispute than in—for example—alleged pervasive safety violations. Here, complainant and respondent are sophisticated for-profit entities. In a matter that, similarly, affected private interests more than the public interest, case law described the standard:

“To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to [resolving the matter], but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.' ”<sup>19</sup>

That is how the Commission construes Staff’s endorsement of the Amended Agreement as “consistent with the public interest.”<sup>20</sup>

The Commission concludes that disposition by settlement is in the public interest so the Commission will approve that disposition.<sup>21</sup>

#### *b. Incorporating*

The signatories ask for an order incorporating the terms of their Amended Agreement. The Commission may do so by issuing a consent order.<sup>22</sup> Such an order,

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<sup>18</sup> 4 CSR 240-2.010(10).

<sup>19</sup> State ex rel. City of St. Louis v. Public Service Comm’n of Missouri, 73 S.W.2d 393, 400 (Mo. 1934).

<sup>20</sup> Amended Agreement, page 4, paragraph 4, last sentence.

<sup>21</sup> Uncontested resolution of this action constitutes good cause for an effective date less than 30 days from issuance. Section 386.490.2, S.B. 48, 96<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess.

by analogy to a consent judgment, memorializes the signatories' settlement without determining the merits of the complaint.<sup>23</sup>

*c. Dismissing*

Also, Superior Bowen seeks leave to voluntarily dismiss the complaint with prejudice ("leave"). Leave is necessary only under the following regulation:

Once . . . prepared testimony [is] filed, [a] complainant may dismiss an action only by leave of the commission, or by written consent of all the parties.<sup>[24]</sup>

Prepared testimony is on file,<sup>25</sup> and written consent of all the parties is absent because OPC offers none, so the Commission's leave is required.<sup>26</sup> The analogous provision in the Missouri Supreme Court's rules for civil actions in circuit court requires a "motion in which the ground for dismissal shall be set forth."<sup>27</sup> The grounds for leave are the same as grounds for approval. Therefore, the Commission will grant leave and deem the complaint dismissed on the effective date of this order.

**THE COMMISSION ORDERS THAT:**

1. Evidentiary Ruling. The *Complaint*, the *Answer of Southern Union Company d/b/a Missouri Gas Energy*, and the *Staff Report* are entered into the record.

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<sup>22</sup> Section 536.060, RSMo 2000. The Commission construes that request in this fashion because the settlement's terms include actions that the Commission cannot order like the positions of private litigants in future litigation.

<sup>23</sup> *Nations v. Hoff*, 78 S.W.3d 222, 223 (Mo. App., E.D. 2002).

<sup>24</sup> 4 CSR 240-2.116(1), second sentence.

<sup>25</sup> *Direct Testimony of William C. Kallberg*, *Direct Testimony of Larry Gervy*, and *Direct Testimony of Trey Bowen*, filed by Superior Bowen on June 3, 2011.

<sup>26</sup> But for the pre-filing of testimony, the Commission's leave—and this order—would be unneeded. 4 CSR 240-2.116(1), first sentence.

<sup>27</sup> Rule 67.02(a).

2. Consent Order. The *Amended Non-Unanimous Stipulation and Agreement* is incorporated by reference into this order as if fully set forth.

3. Dismissal. The motion for leave is granted and the complaint is dismissed with prejudice as of the effective date of this order.

4. This order shall be effective on May 19, 2012.

5. This file shall close on May 21, 2012.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Gunn, Chm., Jarrett and Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge