

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

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In the Matter of Missouri Gas)
Energy's Tariffs to Implement a)
General Rate Increase for Natural) Case No. GR-2004-0209
Gas Service)

MORRIS L. WOODRUFF, Presiding,
SENIOR REGULATORY LAW JUDGE.

REPORTED BY:

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1 P R O C E E D I N G S

2 (EXHIBITS A, B AND C WERE MARKED FOR
3 IDENTIFICATION BY THE REPORTER.)

4 JUDGE WOODRUFF: Good morning, everyone.
5 We're here in Case No. GR-2004-0209, Missouri Gas Energy's
6 tariffs to implement a general rate increase for natural
7 gas service, and we're here today to hear arguments
8 concerning a discovery dispute between the Staff of the
9 Commission and MGE. And we'll begin by taking entries of
10 appearance, beginning with MGE.

11 MR. BOUDREAU: Yes. Thank you. Let the
12 record reflect the appearance of Paul A. Boudreau, with
13 the law firm of Brydon, Swearngen & England, Post Office
14 Box 456, Jefferson City, Missouri 65102.

15 JUDGE WOODRUFF: And for Staff?

16 MR. BOUDREAU: For MGE. Excuse me.

17 JUDGE WOODRUFF: For Staff?

18 MR. FRANSON: Dan Joyce and Robert Franson,
19 appearing on behalf of the Staff of the Missouri Public
20 Service Commission, P.O. Box 360, Jefferson City, Missouri
21 65102.

22 JUDGE WOODRUFF: Thank you. I want to
23 state for the record that we had a conversation yesterday
24 in my office with these two attorneys concerning this
25 dispute that was presented to me informally, and at that

1 time the parties agreed that we would proceed with formal
2 arguments today. According to the Commission's procedure,
3 I'll make a ruling at the end of the arguments, and if
4 anybody's dissatisfied with my ruling, they can request
5 reconsideration with the full Commission.

6 So let's begin with MGE. Mr. Boudreau, I
7 believe you had a motion to make.

8 MR. BOUDREAU: Yes, thank you. I'll keep
9 my comments brief, because as the Bench has already
10 mentioned, we discussed this informally yesterday.

11 What I would like to do just as a matter of
12 mechanics is to offer into the record for purposes of this
13 discussion exhibits that have previously been marked as
14 Exhibits A, B and C, those being respectively the two Data
15 Requests at issue and Staff's objection letter.

16 JUDGE WOODRUFF: Does Staff have any
17 objection to the receipt of those documents?

18 MR. FRANSON: That being A, B and C? No,
19 your Honor, Staff has no objection to those documents
20 being offered into evidence.

21 JUDGE WOODRUFF: Those documents will be
22 received then. Thank you.

23 (EXHIBITS A, B AND C WERE RECEIVED INTO
24 EVIDENCE.)

25 MR. BOUDREAU: I will keep my comments very

1 brief because we've discussed this and I realize time is
2 an issue. But what we're dealing with here is a little
3 bit of data we'll go over again.

4 There was a previous discovery dispute
5 between the company and Staff. There were two Data
6 Requests which were, as I recall, Data Request No. 79 and
7 80 which the company had previously requested that the
8 Staff be compelled to respond to, and that request was
9 denied in a previous hearing in this case. What the
10 company did thereafter is narrowed the scope of the
11 requests.

12 It's basically the same topic, the same
13 subject matter that had been requested previously as set
14 forth in the Data Request, but they have been narrowed
15 somewhat. Each of them has been narrowed somewhat in
16 time, and they have been narrowed somewhat in the sense of
17 the individuals from whom the information is being
18 requested.

19 The time period just for the record was
20 chosen as being the time period from the time of the
21 last -- the resolution of MGE's last rate case to the
22 present, and the request has been narrowed in terms of
23 individuals from Commissioners generally to current
24 Commissioners, and Staff generally to current Staff
25 members.

1 And the two topics deal with rate of
2 return, generally, on the one hand, and the other on
3 depreciation issues on the other. Those are two -- that's
4 not just by coincidence. Those are two pretty big issues
5 in this case in terms of revenue impact.

6 So with that as a background, Staff has
7 submitted a series of objections that are set forth in
8 Exhibit C in a letter that was dated May 21st of 2004,
9 generally being that the Data Requests are irrelevant or
10 unlikely to lead to the discovery of relevant information,
11 that they're unduly burdensome on the Staff, and that it
12 would cause them to engage in inappropriate ex parte
13 contacts.

14 I think that the relevance of the topic is,
15 as I've stated before, that I think that my client has a
16 right under state law to a determination in this case from
17 an impartial decision maker, and that looking at
18 predispositions in terms of particular issues or policies
19 is always an area of appropriate inquiry in terms of
20 determining whether there's a fair procedure and a fair
21 outcome in the case. So I think the relevance is there.

22 As far as the scope, as I mentioned
23 yesterday, scope is in the eye of the beholder a lot of
24 times. I would just submit that the scope in terms of
25 time and the scope in terms of the individuals with

1 respect to whom the information is sought is reasonable in
2 scope, and I'll just leave that as it is.

3 As far as the Staff's claim that this would
4 cause them to engage in ex parte contacts, I'm not sure
5 that's generally -- I'm not sure that that's necessarily
6 the case, but even if it were, I would remind the Bench
7 that not all ex parte contacts are inappropriate. There's
8 been some recent legislation that has been passed by the
9 General Assembly which is -- if I can find my notes here.
10 Excuse me. I'll have to work from memory.

11 I think it was 386.210 which addresses,
12 among other things, the nature of ex parte communications
13 between any party and the Commissioners. I think that the
14 Bench is familiar with the contents of that legislation,
15 but I think the important thing to note from that is that
16 the general goal is not to prevent communications with
17 Commissioners, but to basically facilitate them in some
18 way that the different parties consider to be fair. And I
19 think that the general consensus of or the general goal of
20 the legislation is that, in most cases, the communications
21 are okay, but there's a predisposition towards disclosure.
22 You can have the conversations but let everybody know
23 what's being said.

24 Staff, under Commission rule, is a party to
25 this case, and I think the same sort of principle should

1 apply. If the Staff's having conversations with the
2 Commissioners about topics that are generic or relevant
3 that come up in the context of rate cases from time to
4 time, I think that those sort of conversations should be
5 available to the other parties, so that in this case, for
6 instance, if there's a -- if statements have been made
7 that we, the company, have an opportunity to address the
8 statements that have been made and to tell our side of the
9 story with respect to the issue.

10 So with that, I'll just leave it. I don't
11 think that the objection that it causes ex parte contacts
12 is necessarily all that well taken, certainly not
13 inappropriate ex parte contacts. We're not asking for
14 information or conversations about the issues that have
15 come up in this case. In fact, the text of the Data
16 Request says that if there's conversations outside the
17 context of a rate case, so we're not really asking for
18 anything or any decisions or any conversations that
19 they've had concerning this case.

20 And with that, I'll conclude my comments.
21 What I would like to do, just for the record, is to
22 request a motion that Staff be compelled to respond to
23 company Data Request No. 173 and 174 for the reasons I've
24 stated.

25 Thank you.

1 JUDGE WOODRUFF: Response from Staff?

2 MR. FRANSON: Thank you, your Honor.

3 Judge, what has come up now from Mr. Boudreau is even more
4 troubling than I would have initially suspected. He's
5 laid bare their claims. What they're insinuating now is
6 that the Commission is biased, and they're trying to get
7 ammunition through the Commission Staff. If Mr. Boudreau
8 or any other -- on behalf of MGE or any other party
9 believes the Commission is biased, they need to file
10 something right before the Commission, right here, right
11 now. They need to have it filed within the hour and they
12 need to have it filed immediately.

13 I'm not hearing that. So we have to go to
14 the next step. What are they looking for? They want to
15 know everything they can about Commissioners. They want
16 to ask Commissioners questions directly; they want to get
17 answers from Commissioners directly. Now, granted they're
18 going through a roundabout way, but that's what they're
19 doing. You can't do that.

20 In a lawsuit, A is suing B, you cannot ask
21 questions of the judge. If you believe the judge is --
22 for some reason is not fair and impartial, there are
23 motions for change of judge, there are motions for the
24 judge to be stricken. There are all kinds of ways to do
25 it, but you cannot ask the judge for answers through -- to

1 questions that you're curious about. And that's what
2 we've got here.

3 Judge, on the relevance, well, MGE has
4 filed all kinds of motions to keep out certain evidence,
5 and they say that the relevance, the only issue here is
6 their tariff sheets. There's nothing here in these DRs
7 that are going to lead to any admissible evidence that is
8 going to have anything to do with those tariff sheets. It
9 just simply isn't there. So on relevance, as broad as it
10 is, they lose.

11 On the subject of -- this, quite frankly,
12 is somewhat less burdensome than the ones they had before,
13 and -- but it still requires polling of all Staff members
14 and it still requires direct contact with Commissioners
15 and, Judge, that in and of itself is burdensome.

16 But the ex parte statute that Mr. Boudreau
17 talked about, 386.210, Judge, that governs specific
18 contact with Commissioners; it governs certain times that
19 in pending cases where Commissioners can, in fact, get
20 information from parties -- from entities outside the
21 case, but they have to disclose it.

22 What we're talking about here is
23 conversations between the Commission and its Staff. And
24 it just -- that is not the kind of thing that is supposed
25 to be prohibited and supposed to be deterred and supposed

1 to be constrained by this statute. On the contrary,
2 there's all kinds of communications with Commissioners
3 and, to some extent, the purpose of 386.210 is to tell the
4 Commissioners the bounds and parameters of when they can
5 speak about things, because by its very nature
6 Commissioners have to be very careful, because they are
7 decision makers and they are policy makers, and this sets
8 it out.

9 And here's one way that they may or may not
10 have communicated with Staff on issues. They may have
11 communicated with MGE. MGE goes to all kinds of hearings,
12 all kinds of roundtables. Who knows what is said there?
13 And, Judge, that is just as irrelevant as these, and --
14 but then to answer these DRs, in keeping in mind that MGE
15 is asking for any communication between current members of
16 the Commission Staff and current members of the
17 Commission, they are -- and there's absolutely no mistake
18 about that -- they are asking for Commissioners to give
19 evidence in this case in response to their DR. That is
20 simply improper.

21 They're seeking to make Commissioners
22 witnesses in this case. That is improper. For Staff to
23 answer this, by definition Staff has to go to each and
24 every Commissioner and say, have you talked to any Staff
25 member? In order to answer this properly, that has to be

1 done. That is about this case. That is about something
2 initiated by MGE. It is wrong, it is improper and it is
3 as irrelevant as anything that has really come forth in
4 this case.

5 If they're looking for some kind of bias
6 and ammunition against the Commission, whether it's in
7 this case right here before the Commission or ultimately
8 in some type of appeal, then they need to file the proper
9 motion and they need to file it now, and that isn't being
10 done. This is irrelevant, and it is burdensome and it is
11 totally improper, because what they're doing is seeking to
12 make the decision makers witnesses in the case. Even if
13 it's through the DR process, they're seeking to make the
14 decision makers witnesses.

15 Judge, that is not allowable under any of
16 the rules or statutes, and I'm not aware of any situation
17 where a decision maker can be a witness of any -- in any
18 way, shape or form and then make a fair and impartial
19 decision. That's not how the whole system is designed.
20 It's designed for the decision maker to hear the evidence,
21 and then make a fair and impartial system -- or decision,
22 and this is a direct interference with that process, and
23 for that reason also it should not be allowed.

24 But it's irrelevant, it is somewhat
25 burdensome, and it -- to be answered requires direct

1 contact by Staff to Commission. That, and it is about
2 this case. No matter how you frame it, it is this case
3 that causes that contact, thus it is about that case.
4 Also, Judge, MGE knows they can't go depose the
5 Commissioners directly, but this is just a roundabout
6 attempt to do that, and, Judge, it just simply has no
7 place in this case.

8 I believe Mr. Joyce may have a comment.

9 JUDGE WOODRUFF: Mr. Joyce?

10 MR. JOYCE: Thank you, Judge. I rarely get
11 involved in discovery disputes. It's something I usually
12 leave to the Staff counsel to work out with the company
13 counsel, but when I was made aware of this particular
14 dispute, I thought it important that the Commission's
15 General Counsel weigh in on it.

16 I don't have a lot to add to what
17 Mr. Franson said, but I think the comments of Mr. Boudreau
18 really do lay bare the purpose of these requests. They're
19 trying to get into the minds of the Commissioners. While
20 I believe that certainly it's appropriate to have a fair
21 and impartial tribunal, as Mr. Franson said, that attack
22 needs to be made directly by raising the issue directly
23 with the Commissioners. If they're trying to see what
24 forms the minds of Commissioners in terms of making their
25 decisions, then why aren't they asking what kind of books

8 I may make you aware of a case that you
9 might be aware of. Mr. Boudreau should be also; a member
10 of his firm handled it. It was a primary toll carrier
11 case in which bias was alleged because of an improper
12 taint, because a Staff member of the Commission working
13 for the Commissioners was involved in a similar case that
14 was merged in with the PTC case. And so during the
15 pendency of the PTC case, this Staff member had access to
16 the Commissioners.

25 If they're seeking information as to the

1 fairness and impartiality of the tribunal, they need to be
2 looking at contacts that are occurring during the case
3 that are brought that would bias the counsel. So the
4 Commission -- I'm sorry. So I think this -- it's totally
5 irrelevant.

6 The other point I want to make is that
7 granting this request could set a dangerous precedent, and
8 it could have a chilling effect on any contacts that can
9 occur outside of a case between the technical Staff and
10 the Commission. And because of that, I think you have to
11 give serious consideration to granting this request.

12 So to sum up, due to its irrelevance and
13 for important public policy reasons, the Staff should not
14 be required to respond to this discovery.

15 Thank you.

16 JUDGE WOODRUFF: Thank you, Mr. Joyce.

17 Anything else to come in before I make my
18 ruling?

19 MR. BOUDREAU: Just a couple of quick
20 comments, if I might.

21 JUDGE WOODRUFF: Go right ahead.

22 MR. BOUDREAU: Okay. I'd like to address
23 just briefly some of the topics that have been brought up.
24 Let me address Mr. Joyce's comments first. If the
25 technical -- he brought up the prospect of it would chill

1 conversations between the Staff and the Commission. And
2 if the Staff weren't a party to the case, I probably
3 wouldn't be asking these sort of questions, but Staff is a
4 party to the case. That's why we're not asking for
5 conversations that have been had with other Commissioners
6 at other meetings.

7 The fact of the matter is, Staff's a party
8 to the case and that's just a reality. So asking about
9 what another party in the case may have said about the
10 generic issues that kind of carry over from rate case to
11 rate case I don't think is an inappropriate question. If
12 they're going to be parties to the case, I think those
13 sort of inquiries are not inappropriate. And so I think
14 they're narrowed to the party in interest.

15 In terms of the idea that somehow MGE is
16 setting about trying to disqualify Commissioners, I think
17 that is massively overstated. We're not trying to
18 disqualify Commissioners. What we are trying to do is
19 understand what their starting point is in terms of what
20 their thinking on these issues is, to the extent these
21 conversations have been had.

22 If there have been workshops where the
23 Staff has explained that this is why we do the rate of
24 return determination the way we do, this is why we do
25 depreciation the way we do, then we kind of know what

1 their starting point is. It gives the company an
2 opportunity to come in and address those predispositions,
3 to hopefully have a more fair hearing. So at least we
4 know what the default thinking is to begin with. We can
5 put on some evidence to perhaps counter some of those
6 notions if we disagree with them.

7 I don't know that necessarily this requires
8 that many, if any, questions be asked of the
9 Commissioners. Presumably the Staff knows who's been
10 talking to the Commissioners from their perspective.
11 That's an overstated concern as well.

12 I don't think that all Staff needs to be
13 polled. I mean, I don't know how the business is
14 conducted over here, but I would suspect that the number
15 of people on the Staff that communicate with the
16 Commissioners directly on any sort of regular basis about
17 topics of any consequence is a fairly narrow slice of the
18 people that have been hired by the Commission.

19 And to reiterate, what we're asking for
20 here is not a whole heck of a lot more from the
21 Commissioners than what the statute governing ex parte
22 contacts already requires; that is, that if you have
23 conversation, disclose. That's all we're asking for, have
24 the conversations taken place, what is the -- what's been
25 the general tenor of them, what context have they taken

1 place in with what particular objective? That's what
2 we're looking for.

3 With that, I'll conclude my comments.

4 JUDGE WOODRUFF: At this point, then, I'm
5 ready to make my ruling on the record. The motion to
6 compel will be denied. These Data Requests are not likely
7 to lead to the discovery of relevant information. All
8 relevant actions of the Commission are available in the
9 orders and minutes of its agenda meetings. That's the
10 only way the Commission can speak.

11 What this Data Request is asking for are
12 information about informal conversations between
13 individual members of the Staff and individual
14 Commissioners, and those conversations are just that,
15 conversations between individuals, not actions of the
16 Commission. If any such conversation did take place, they
17 cannot be -- as conversation between individuals they're
18 not relevant to any issue that's before the Commission in
19 this case. And on that basis the motion to compel will be
20 denied.

21 Now, as I indicated earlier, the procedures
22 of the Commission do allow for the possibility of a
23 request for reconsideration by the full Commission.
24 I'm going to ask that the court reporter have the
25 transcript of today's proceedings available by Wednesday

1 of next week, which would be June 2nd. If such a motion
2 is filed, the Commissioners then can consider it at their
3 agenda meeting on Thursday of next week.

4 Thank you.

5 MR. BOUDREAU: Thank you.

6 WHEREUPON, the hearing was adjourned.

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