

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

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| In the Matter of Missouri Gas Energy, a |) | |
| Division of Southern Union Company, |) | <u>File No. GS-2013-0400</u> |
| Concerning a Natural Gas Incident at 910 West |) | |
| 48 th Street in Kansas City, Missouri. |) | |

**MGE’S OPPOSITION TO MOTION TO AUTHORIZE DEPOSITION OF
MISSOURI PUBLIC SERVICE COMMISSION STAFF MEMBERS
FILED BY HEARTLAND MIDWEST, LLC.**

COMES NOW Respondent Missouri Gas Energy (“MGE”), and respectfully requests that the Commission deny Heartland Midwest, LLC’s motion to authorize the depositions of members of the Commission’s Staff. In support of its request, MGE states as follows:

1. Heartland is seeking depositions of Staff members Richard A. Fennel, Robert R. Leonberger, and Mark Struckhoff regarding their preliminary work in an ongoing investigation of the February 19, 2013, natural gas explosion at 910 West 48th St., Kansas City, Missouri (the “Incident”). As the Commission has acknowledged, this is a continuing investigation of a very complex matter that has spawned multiple civil cases. The Commission has entered Orders to prevent the potential for detrimental interference and confusion between the proceedings before the Commission and the civil litigation.

2. Heartland’s request for permission to depose the Commission Staff regarding information obtained in this ongoing investigation is precisely the type of interference that must be avoided. Heartland is the party that bored into and ruptured MGE’s gas line; Heartland was the direct cause of the incident. When the original Staff Report was released on February 6, 2014, Heartland immediately trumpeted the report in its pleadings and to the media, using the

Commission as a tool in an attempt to deflect blame to MGE. Heartland's current motion to depose the Commission's Staff demonstrates that Heartland intends to continue on this course.

3. Heartland has failed to demonstrate good cause for the extraordinary relief it requests. The February 6, 2014, Staff Gas Incident Report is not a final finding by the Commission: as acknowledged by Staff and the Commission, this report was a first step in an ongoing process and is subject to substantial revision as information becomes available. The Commission has already determined that Staff's work should follow, not lead, the civil discovery process. As directed by the Commission, each month MGE provides to Staff all of the discovery obtained and produced in the course of the civil litigation. The investigation is ongoing, as are private discussions between MGE and Staff regarding possible improvements to MGE procedures.

4. Of course, Heartland has access to the same civil discovery as is being provided to the Commission. Heartland has no right to discovery concerning settlement discussions between Staff and MGE in this case, and no right to Staff's work product. Heartland has utterly failed to demonstrate that exposing Staff to civil depositions during an ongoing investigation is necessary or in the interest of the Commission.

A. Procedural Background: File No. GS-2013-0400 is not separate from the ongoing investigation of File No. GC-2014-0216.

5. Contrary to the assertions made by Heartland, the investigative proceeding in File No. GS-2013-0400 is not separate or severable from the Complaint Proceeding in Case No. GC-2014-0216, and it is simply not tenable to argue that discovery or other actions taken in one will not affect the other. This is demonstrated by the procedural history of these cases:

(a) On February 27, 2013, the Commission directed Staff to investigate the Incident under File No. GS-2013-0400.

(b) On February 6, 2014, the Regulatory Review Division issued Staff's Gas Incident Report in File No. GS-2013-0400. Also on February 6, 2014, Staff filed a Complaint in File No. GC-2014-0216, making various allegations against MGE concerning its response to the Incident.

(c). On February 19, 2014, the Commission entered an Order closing File No. GS-2013-0400 to avoid any confusion with the ongoing adversarial action, File No. GC-2014-0216.

(d). On March 10, 2014, MGE moved to dismiss or hold in abeyance the proceedings in File No. GC-2014-0216, because, *inter alia*, as a result of the very complex nature of the case, the February 6, 2014, Gas Incident Report was necessarily based upon an incomplete investigation and contained numerous inaccuracies. MGE suggested that the very extensive discovery taking place in the civil litigation offered a more efficient process than relying upon a parallel investigation using Staff's limited resources. As noted in MGE's motion:

17. Finally, the Commission should be cognizant of, and choose to avoid, the risk that the publicity surrounding Staff's Report and the Complaint will infect and distort the fact finding process. Staff has given its mark of approval to a version of the "facts" that plainly has failed to take into account the sworn testimony of eyewitnesses and relies instead upon the unattributed statements of parties who have their own agendas. As we have already seen, some of those interested parties, particularly Heartland Midwest, LLC, have been quick to parade this "official" version to their own advantage. The risk that both witnesses' recollections and the jury pool will be improperly influenced by these proceedings is obvious and is obviously detrimental to the interest of the State of Missouri in seeing justice done in this case.

(e) On April 2, 2014, the Commission entered an Order in File No. GC-2014-0216 that denied MGE's motion to completely hold the adversary proceeding in abeyance, but acknowledged the legitimacy of MGE's concerns about the risks of parallel civil and administrative proceedings.

(f) On May 21, 2014, the Commission entered its Order Establishing Procedural Schedule in File No. GC-2014-0216. In the May 21, 2014, Order, the Commission accepted the

joint suggestion of Staff and MGE that the Commission allow the extensive civil discovery effort to proceed first, with MGE to provide the Staff with the unfiltered copies of the discovery materials. As explained by the Commission:

“In particular, it is appropriate to delay a hearing on the possible imposition of penalties for past actions until after discovery in the civil actions is complete. The Commission does not want to interfere in the civil litigation process.”

6. Since this procedure was established, Staff has received monthly updates from MGE containing the discovery generated in the civil litigation and has provided monthly Status Reports to the Commission in File No. GC-2014-0216. This process will continue through at least February 2015, as discovery in the civil litigation continues through then, and potentially longer. In addition, as directed by the Commission, the Status Reports advise the Commission of the ongoing progress of the discussions between MGE and Staff regarding Staff’s recommendations for prospective changes in MGE’s policies and procedures. As discussed more fully below, the relief requested in Heartland’s Motion would inappropriately create the very kind of impermissible interference between the civil and Commission proceedings relating to this matter that the Commission sought to avoid with the procedural framework established in these cases.

B. Heartland’s attempt to further capitalize on the initial Gas Incident Report is an unjustified and unfair intrusion upon the investigative process.

7. Heartland’s motion should be denied because it completely fails to explain what information it hopes to obtain that can be properly disclosed. As the Commission’s correctly notes, and as Heartland acknowledges, the information sought by Heartland is protected by RSMo. § 386.480. MGE does not agree to waive the protections of that statute as to its information it has provided in extending its cooperation to the Staff. In addition, presumably the Staff does not intend to waive the attorney-client and work product privileges. The trial court in the civil cases has already ruled that settlement discussions are off limits for discovery in those cases. Heartland’s

motion offers no specifics about the information it seeks and why it is necessary or appropriate that Staff be witnesses in the civil litigation. Heartland has the burden of establishing its right to relief. But Heartland has wholly failed in explaining even what it hopes to achieve, much less establishing that its goal is necessary or just.

8. Heartland's motion should also be denied because Heartland fails to explain why the information it could properly obtain is not available from other sources in civil discovery in the pending litigation. Under the Commission's Orders, Staff's information is largely based on the information disclosed in the civil discovery process. Heartland already has that information; there is no need to interfere in Staff's investigation to obtain this information.

9. Heartland's motion should be denied because there is no substantial need for "a discussion" of the February 6, 2014, Gas Incident Report, File No. GS-2013-0400. Both Staff and the Commission have acknowledged that the report, and the complaint filed in GC-2014-0260, are subject to substantial revision following the close of civil discovery and a more complete understanding of the evidence. Leaving to the Court the obvious barriers to admitting either document into evidence, the fact remains that Heartland is asking the Commission to grant extraordinary relief so it can make a record regarding a preliminary report by the Commission Staff.

10. Heartland's Motion should be denied because Heartland's requested topics, the "discussion" of Staff's methods, investigation, findings and report in File No. GS-2013-0400, have no rational limitation. (*See* Heartland's Motion, ¶ 9 (a-c)). If the Commission chooses to allow this inquisition, Heartland is given license to go in any direction it chooses. The use of the vague term "discussion" suggests that Heartland wants these depositions for the purpose of enlisting Staff as

involuntary and unpaid expert witnesses in civil litigation outside of the Commission's control. To protect the institution, the Commission should not permit this misuse of its Staff.

11. Heartland's motion should also be denied because it is impossible to separate the information learned in the course of the investigation in File No. GS-2013-0400 from the ongoing investigation by the Staff in File No. GC-2014-0216. As demonstrated above, the latter is a continuation of the former, and it seems clear, even to Heartland, that questioning Staff about an ongoing investigation is never proper.

12. Even if it were possible to separate the information learned in the course of the investigation in File No. GS-2013-0400 from the ongoing investigation by the Staff in File No. GC-2014-0216 that result would be manifestly unfair, because it would allow Heartland to question Staff about the preliminary report that Heartland views as favorable, but preclude any questioning about Staff's current positions based upon the much greater volume of information it now possesses. To the extent that the Commission would consider allowing these depositions, the only just solution would be to include File No. GC-2014-0216 in the waiver.

13. Heartland's motion should be denied because under any construction, it has unintended consequences that are directly contrary to the Commission's prior orders. Very clearly, it would be highly improper for MGE to attempt to use subpoenas issued in the parallel civil matters to obtain Staff's depositions about the Gas Incident Report underlying the administrative complaint. MGE has not resorted and would not resort to such a tactic, nor would it expect the Commission to condone it. However, if the Commission authorizes Heartland to take these depositions, the effect is the same. If Staff's depositions are permitted in the civil cases, then MGE has the undeniable right and obligation to vigorously cross-examine Staff at those depositions. While MGE would normally welcome an opportunity to refute the inaccurate portions of the

February 6, 2014, Gas Incident Report, MGE respectfully suggests that the proper forum for that discussion is the Commission proceeding in File No. GC-2014-0216, not the parallel civil litigation.

14. Granting Heartland this unfettered access to Staff is manifestly unfair to MGE. MGE has participated in good faith in the process established by the Commission; changing the rules at this point would be counter-productive and unjust. Abrogating RSMo. § 386.480's promise of confidentiality, after the information is provided, is extraordinary relief, particularly when sought by a non-party to any Commission proceeding. Heartland has offered no justification for such extraordinary relief.

15. There is no unfairness in denying Heartland's request for relief from RSMo. § 386.480. There is no showing that the information is necessary for Heartland's defense, and no showing of any unfair advantage to any other party. It should be noted that, although Heartland is not subject to the Commission's jurisdiction, it is the subject of an active federal OSHA investigation. By law, the OSHA investigators generally are immune from civil subpoenas. *See* 29 C.F.R. §§ 2.20-2.25. Allowing Heartland to obtain depositions about the work product of Commission Staff, while discovery about Heartland's own regulatory problems are confined to the published record, clearly gives Heartland an unfair advantage in the civil litigation.

16 The Commission's Order of May 21, 2014, in File No. GC-2014-0216 made it clear that the Commission did not want to interfere in the civil proceedings. Granting Heartland's Motion will have the opposite effect.

- C. At the very least, the Commission should deny Heartland's request for an exception to RSMo. § 386.480 on the grounds that Heartland has not shown good cause for obtaining an order of the Commission making MGE's information public.**

Section 386.480 prohibits the disclosure of information furnished to the Commission by a public utility unless ordered by the Commission. This law doesn't prevent the Commission Staff from producing its own information, but it does indicate that outside parties, such as litigants, should not, without good cause, be allowed to use the regulatory relationship between the utility and the Staff to obtain the utility's documents. As stated above, Heartland has the same access to MGE's information as any litigant. If Section 386.480 is to mean anything, Heartland must show some good reason why it should obtain MGE's information from Staff and not from MGE. Heartland has offered no good cause at all. As discussed above, Heartland's offer to limit the scope of the depositions is really no limit at all. If the utility believes that documents provided to Staff are generally open to the public despite the terms of Section 386.480, then MGE must treat Staff's information requests with the same legal caution that it treats other discovery under the rules of civil procedure.

WHEREFORE, Respondent Missouri Gas Energy respectfully requests that Heartland's Motion to Authorize Depositions of Staff Members be DENIED, and for such other relief as the Commission deems appropriate.

Respectfully submitted

**LACLEDE GAS COMPANY
Doing business as MGE**

/s/ Rick Zucker

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2014, a true and accurate copy of the foregoing was electronically filed with the Missouri Public Service Commission and also served by **email** and by **United States mail**, postage prepaid, on the following:

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