

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

The Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	
)	
vs.)	Case No. GC-2014-0216
)	
Laclede Gas Company, doing business as Missouri Gas Energy,)	
)	
and)	
)	
Southern Union Company, formerly doing business as Missouri Gas Energy)	
)	
Respondents.)	

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

RESPONDENT MGE’S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO HOLD CASE IN ABEYANCE WHILE STAFF PROVIDES A MORE DEFINITE STATEMENT, AND TO REOPEN THE INVESTIGATION CASE

Respondent Laclede Gas Company, doing business as Missouri Gas Energy (“MGE”) respectfully moves, pursuant to RSMo. 536.068, for an Order dismissing without prejudice the above captioned Complaint for failure to state a claim upon which relief may be granted. In the alternative, MGE asks for an Order holding this case in abeyance while Staff provides a more definite and accurate statement of the claim, based not on undeveloped assumptions and estimates, but on the sworn testimony of the eyewitnesses presently being provided in the ongoing civil litigation. In either case, the Commission should reopen Case No. GS-2013-0400

(the “Investigation Case”) and direct Staff to revise and update its February 6, 2014 Gas Incident Report (the “Report”) based on such testimony.

MGE respectfully submits that the Staff investigation could not, and did not, comprehensively determine the pertinent facts prior to filing the Complaint and the Complaint should not have been filed based on the record assembled by Staff. Accurate, sworn accounts of the facts are now available, and more information is being gathered each day, as a result of the discovery in the parallel consolidated civil proceedings taking place in the Circuit Court of Jackson County, Missouri. The parties to the consolidated civil actions have exchanged tens of thousands of pages of documents, including documents that are subject to the Court’s protective order, and have issued subpoenas to obtain documents from non-parties. In the Circuit Court, numerous fact witness depositions have been taken pursuant to the Missouri Rules of Civil Procedure, under oath and with the opportunity for all parties to the civil litigation to cross examine as to the testimony and exhibits. MGE believes that this testimony seriously undermines the legitimacy of Staff’s conclusions and allegations in both the Report and the Complaint. Many more depositions will be taken. Opinions and testimony will be provided by the leading experts in the nation on emergency response, directional boring, subsurface utility engineering and subsurface utility locating practices, among other disciplines. The Staff, the Commission, and the public which we each serve, should have the benefit of this information before proceeding with the administrative hearing process.

In the interest of a just, accurate and efficient proceeding, MGE respectfully requests that the Complaint should be dismissed without prejudice until such time as the Staff can review the results of the civil discovery process and provide a more definite statement of its claims. MGE requests that the Investigation Case be reopened and that Staff be instructed to supplement its

Report after fact and expert discovery closes in the civil litigation and the Staff has the opportunity to conduct any follow-up interviews or depositions. If, after evaluating all of the sworn testimony, Staff is still of the opinion that MGE violated its emergency procedures, then a Complaint can be refiled. However, MGE believes that the evidence produced in the civil litigation has already amply demonstrated that MGE did not violate its own emergency procedures, or any common law duties.

The most efficient, accurate and fair mechanism for developing a complete factual record is already established and functioning as the discovery process in the consolidated civil cases now pending in the Circuit Court of Jackson County. There is no need to duplicate that process here. MGE respectfully submits that adjudicating the Complaint at this time and conducting parallel administrative and civil proceedings will necessarily result in either (a) the Commission attempting to make a determination on an incomplete and inaccurate factual record; or (b) a very costly and wasteful attempt to reproduce the factual record being developed in a civil case at a cost of hundreds of thousands of dollars. The present procedural posture prevents the Commission from considering all of the relevant facts that it needs to make an informed decision regarding the disposition of this Complaint and is plainly unfair to MGE. Adjudicating this Complaint at this time further requires a needless expenditure of state resources and risks a fundamentally flawed fact finding process that does not meet the requirements of Due Process. Neither result should be acceptable to the Commission. MGE respectfully submits that the Commission should not move forward until it can do so with confidence that it is being presented a full and accurate understanding of the events of February 19, 2013.

To be very clear, MGE does not contend that Staff or the Commission lack the authority to investigate and pursue their statutory duties. MGE also does not suggest that the Commission

should abstain from its duties in favor of the private civil litigation. MGE is committed to fulfilling its duties to the public and the Commission. MGE has cooperated fully with the Staff in its investigation to date. However, MGE respectfully submits that in the present complex circumstances, the Commission's role and duties can be best fulfilled by an orderly process, including a complete investigation involving all Missouri operators and considering the facts that are or will be available through the ongoing discovery process in the civil litigation. The Commission and the Staff should have the benefit of the best available information before attempting to litigate safety issues in an adversarial administrative proceeding.

Indeed, it is questionable whether the Staff's recommendations need to be litigated at all. MGE is, and always has been, committed to the safety of the public and its employees. MGE remains receptive to conducting workshops with Staff and other Missouri operators to discuss possible improvements to procedures that might be proposed to the Commission pursuant to 4 CSR 240-2.115, or that might otherwise be agreed upon, even while discovery in the civil action is proceeding. Accordingly, granting the relief requested herein would in no way slow the introduction of any measures that might further enhance public safety, and may in fact expedite institution of those measures. However, if the Commission deems it necessary to move forward with the Complaint, MGE respectfully submits that doing so at this time may not result in the Commission making as informed a decision as possible and would not result in a just, accurate or efficient process for developing a factual record.

In support of this motion, MGE states as follows.

1. This matter arises from the February 19, 2013 gas line breach by a directional boring contractor, Heartland Midwest, LLC, near JJ's Restaurant in Kanas City, Missouri (the "Incident").

2. MGE reported the Incident to the PSC as required by law and has fully cooperated with Staff by providing the information requested. MGE has provided an extensive number of documents, photographs, audio recordings, and videos about the events surrounding the Incident. At Staff's request, MGE made several of its employees who were involved in the response to the Incident available for in-person interviews by Staff. MGE also provided Staff with 3D scans, ground penetrating radar data, sewer videos and surveillance videos of the site. MGE also provided written responses to Staff's information requests, including a thirty-six page narrative response to Staff's request for information.
3. However, there are numerous factual inconsistencies in the various witness statements paraphrased in the Staff Report and in the litigation positions being asserted by other parties to the consolidated civil suits. These discrepancies relate to the very heart of the allegations made against MGE in the Complaint and the inconsistencies raise questions that cannot be resolved without an opportunity to examine fact and expert witnesses under oath.
4. The Staff filed the Report on February 6, 2014, and without affording or recommending that MGE be permitted an opportunity to respond, also filed the Complaint on that same day.¹ In the Report, Staff asserts that it has conducted many "interviews" with fact witnesses, but has not identified those witnesses and it is not clear what facts were discussed with those witnesses. MGE was not present for most of those interviews and it is not clear what questions were asked of these witnesses.

¹ On February 19, 2014, the Commission issued its Notice closing the file on GS-2013-0400, upon its finding that GS-2013-0400 sought the same relief as being sought in the complaint case, GC-2014-0216 and "to avoid any confusion with the ongoing complaint case." Accordingly, MGE is addressing this motion to the complaint case. However, as stated above, MGE also asks that the Commission re-open GS-2013-0400 so that Staff may file an amended report after reviewing all the evidence.

5. MGE understands that Staff did not interview any employees of USIC, the company that marked the lines on behalf of MGE and the City, although USIC's conduct is featured prominently in Staff's Report. Similarly, it does not appear that Staff has interviewed the Kansas City Fire Department personnel² who were on the scene, and inside JJ's Restaurant, *before* MGE even arrived at the scene. Further, although Staff's Report places great significance on the actions of MGE's first responder, the Staff interview of him was very brief. MGE's first responder has now given a two-day deposition that covers the pertinent facts in much more detail. Given the first responder's role in these events, proceeding with the current Complaint without a full understanding of his actions at the scene is counter-productive to the Commission's fact finding process. The same is true for the other MGE employees who were involved in the emergency response to the gas line breach by Heartland Midwest. If Staff will pause long enough to consider the eyewitness testimony, MGE is confident that Staff would revise and/or withdraw many of the allegations made in the Report, and, in particular will reconsider its decision to single out MGE in the Complaint.
6. As Staff's Report acknowledges, there are gaps and assumptions in the factual record before the Commission. There are numerous witnesses who have not been interviewed and essential pieces of evidence that have not yet been examined by qualified experts. The Staff's Report acknowledges that it has incomplete information about the location and marking process followed by USIC, and relies only upon Heartland's explanations of how Heartland responded to the markings, what Heartland employees found when they pot-holed around those markings, and how Heartland employees interpreted what they saw. These issues directly relate to

² All four members of KCFD's Pumper 19 have now given a deposition.

the cause of the Incident and require a more thorough inquiry (Report; 2:22-3:4; 5:11-13; 17-20).

7. Although Staff appears to base many of its allegations against MGE on temporal issues concerning MGE's leak investigation and response, Staff also acknowledges that it cannot even account for the time between its estimate of when Heartland's directional drilling operation punctured MGE's gas line (around 4:30 p.m.) and Heartland's twenty-four minute delay in notifying the fire department (at 4:54 p.m.) of the escape of gas caused by that leak (Report, 73:15-74:1-4; 83:20-23; 84:22). The Staff's Report also acknowledges that there are unresolved conflicts (by a matter of hours) in its evidence as to the time that elapsed between the first witnesses reporting smelling gas at the scene and Heartland's report to authorities (Report, 25:20-22, 26:1-6). In fact, several witnesses have now testified that they were smelling gas in the vicinity of JJ's Restaurant much earlier in the afternoon, beginning as early as 1 p.m. (Deposition Testimony dated February 20, 2014) and others who noticed a strong smell of gas already in and around JJ's Restaurant at or before 4:30, the time around which Staff contends the line breach occurred. The Complaint asserts MGE's response was not a timely or sufficient response to an emergency, but the Complaint fails to state a valid claim against MGE because this assertion is based on unsupported assumptions of the time frame of events leading up to the Incident. Not only is this fact finding process insufficient under RSMo. 536.063(2), it has led to an erroneous assertion by Staff that MGE violated its emergency response procedures in this case.

8. Similarly, and more problematic, Staff does not provide direct quotes or attribution for its conclusion that, although MGE³ told JJ's management to evacuate the restaurant on three separate occasions, according to Staff, those orders were not given in a forceful enough manner (Report, 19:3-18; 20:3-8; 40:19-41; 89:1-7; 93:9-10). Instead, Staff simply states that its conclusion that the warnings were not forceful enough is based upon a "general consensus of interviews and also on conversations from patrons in JJ's who overheard MGE personnel." (Report, 80:5-7; 81:17-19; 82:13-16; 83:3-5; 83:15-19; 84:13-15; 85:6-8; 85:14-18). That "general consensus" has been refuted by the specific testimony obtained in the civil discovery process. A Report, and now a Complaint upon which penalties could be assessed, that relies upon a "general consensus" of ex parte interviews with unnamed witnesses (some of whom were likely contemplating a civil action against MGE and others) is not an adequate basis for this Complaint and has led the Staff to a conclusion that is insupportable. This process, and this Complaint, do not provide the Commission with a verifiable basis to assess the facts, and MGE with a reasonable basis upon which to formulate a defense as required by RSMo. 536.063(2) and (3). Although the Staff's conclusions are plainly inadmissible in the civil proceedings, the publicity surrounding Staff's premature and inaccurate conclusions presents a risk of substantial interference with, and prejudice to, the civil fact finding process.
9. There is a logical, efficient and just way to resolve this problematic situation. The Incident is the subject of eleven civil lawsuits currently pending in the Circuit Court

³ One of the two MGE employees who went inside JJ's Restaurant has now given a deposition in the civil litigation. The other MGE employee will give a deposition in the near future.

of Jackson County, Missouri.⁴ These cases have been consolidated for discovery and a Special Master has been appointed by the Circuit Court to oversee the discovery process. Thousands of documents have been exchanged and there are more requests for information and documents that are now outstanding. The civil discovery effort is requiring an extraordinary amount of resources from the civil parties (including MGE, Heartland Midwest, Time Warner Cable, and USIC) and has required the cooperation of many fact witnesses, some of whom have no other interest in the matter. MGE offered to provide Staff with the information and documents gathered in the civil litigation, including discovery responses and deposition transcripts. That offer was declined by Staff. MGE believes that the issues presented are important enough that thoroughness must be held more important than expediency.

10. As of the date of this motion, more than 25 depositions have been taken in the consolidated civil litigation, with at least 10 more depositions already on the calendar in the next month. Although the final witness lists have not been completed and expert witnesses have not yet been identified, the parties expect that in total there will be over 100 depositions taken. The witnesses who have been deposed include customers and employees of JJ's Restaurant, employees of KCFD and MGE, as well as persons from surrounding buildings who were present at or near the scene and

⁴ Lindsay Simmons, et al. vs. Time Warner Cable Midwest, LLC , et al., Case No. 1316-CV07265; Michael and Crystal Tanner v. Southern Union Company, et al., Case No. 1316-CV09906; JJ's Bar and Grill, Inc., et al, v. Southern Union Company, et al., Case No. 1316-CV11288; Aaron Meek, et al. v. Southern Union Company, et al., Case No. 1316-CV13523; Carter Marshall Cramer, et al. v. Time Warner Cable Midwest, LLC, et al., Case No. 1316-CV13738; Plazaview, LLC v. Southern Union Company, et al., Case No. 1316-CV16817; Patrick Woodward v. Southern Union Company, et al., Case No. 1316-CV22020; Dr. Steven C. Mingos, et al. v. Southern Union Company, et al., Case No. 1316-CV18072; Michael A. Palier v. Heartland Midwest, LLC, et al., Case No. 1316-CV18684; Matthew Couture, et al. v. Southern Union Company, et al., Case No. 1316-CV18787; William Matthew Nichols, et al. v. Time Warner Cable Midwest, LLC, et al. , Case No. 1416-CV04420.

witnessed these events, including several witnesses that smelled gas that afternoon. Staff does not have the resources required to duplicate this investigation with new discovery depositions, nor would it be a reasonable use of State resources to try to duplicate this exhaustive fact finding process. The consolidated civil case concerns the same issues and facts as this proceeding. It is therefore proper, and in this case necessary, for the Staff and Commission to look to the evidence, and particularly the deposition testimony, that is being developed in the interwoven consolidated civil actions. See *Environmental Utilities, LLC v. Public Service Comm'n*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007).

11. The witnesses deposed to date have provided very material and specific factual information that cuts through the generalized allegations made by Staff in the Report and Complaint. Staff should not proceed with its Complaint without considering the testimony of the several witnesses who first smelled gas much earlier than calculated by the Staff in the Report and Complaint. Nor should Staff proceed without considering the first-hand accounts from witnesses who saw and heard the response to the Incident by the Kansas City Fire Department, Heartland, JJ's management and MGE. This Complaint should not proceed based on Staff's assumptions and generalizations when there is or will be sworn testimony readily available in the record of the consolidated civil litigation arising from the exact same incident.
12. In an adversarial proceeding, the Commission and Staff have a duty to provide Due Process to both the public and MGE. U.S.C.A. Const. Amend. 14; V.A.M.S. Const. Art. 1, § 10. This includes the obligations to investigate adequately and properly, to permit the introduction of, and preservation of, all relevant evidence and to base

official actions, such as a complaint, on the best information available, instead of using generalizations and assumptions to fill in the gaps in the investigation. *See State ex rel. Praxair, Inc. v. Missouri Public Service Comm'n*, 344 S.W.3d 178, 186-187 (Mo. 2011) and *Edwards v. Gerstein*, 363 S.W.3d 155, 162-163 (Mo. App. W.D. 2012).⁵ An administrative decision that fails to consider important issues and evidence cannot stand. To meet the basic obligations of Due Process and avoid acting in an arbitrary manner, the Commission should not turn a blind eye toward potentially relevant evidence, nor should it base decisions upon “surmise, guesswork, or “gut feeling.” *Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 11 (Mo. 2008); *Barry Service Agency Co. v. Manning*, 891 S.W.2d 882, 893-94 (Mo. App. W.D. 1995) (reversing Director’s decision, and stating that “a more searching inquiry based on ... objective data rather than mere surmise, guesswork, or a ‘gut feeling’ ... will be necessary to meet basic standards of due process and to avoid being arbitrary, unreasonable and/or capricious”). The Commission should not proceed with this adversarial action in conscious disregard of the ongoing discovery process and the sworn testimony of eyewitnesses given in the consolidated civil actions.

13. MGE welcomes a full and complete investigation because the evidence has shown, and will further prove, that MGE fully complied with its procedures and duties. MGE understands that the Commission demands a full and complete investigation so it may fulfill its duties to the public. But if this adversarial proceeding moves forward independently from the consolidated civil actions, the Commission will be required to

⁵ The history of the *Edwards* case very graphically demonstrates the risks to Due Process and the credibility of the State when an adversarial action is undertaken based upon publicity rather than a complete and accurate factual investigation.

duplicate the thousands of hours of effort now being devoted by the parties to factual discovery in the civil litigation.

14. MGE respectfully suggests that the far better course is to reopen the Investigation, dismiss the current Complaint without prejudice, and allow Staff to re-file a complaint if it so chooses after it has updated its Report based on the sworn testimony of all the fact and expert witnesses in the consolidated civil proceedings. Alternatively, the Commission could hold the Complaint proceeding in abeyance pending the completion of discovery and depositions in the consolidated civil proceedings. In either alternative, Staff should make use of the opportunity to review the testimony and exhibits so that its Report may provide a complete and accurate statement of the facts prior to bringing an amended adversarial action before the Commission. This course will result in a Commission decision that more fully comports with Due Process and the Commission's desire to fulfill its duties with accuracy, competence and efficiency:

- a. The depositions of the fact and expert witnesses in the consolidated civil actions are moving forward on an aggressive schedule overseen by the Court and the Special Master; the witnesses are being examined, and defended, by experienced, knowledgeable lawyers in order to develop a complete and comprehensive record. Using these depositions, rather than informal interviews, the Staff will be able to base their allegations upon the witness' sworn and final testimony, tested and supplemented by cross examination.
- b. The record being developed in the civil litigation can be contemporaneously provided to the Staff. Of course, should Staff believe that further interviews

or questions are necessary, that is within the Staff's purview and MGE will cooperate in arranging for depositions in this proceeding after Staff has reviewed the discovery from the civil litigation. RSMo. 536.073.

- c. Through the use of the record being created in the consolidated civil litigation, Staff will be able to both obtain more accurate information and conserve its resources by not having to duplicate these examinations.
- d. The information obtained in the discovery process will allow Staff to complete a factual investigation that is far more comprehensive than Staff resources will permit, and, because the civil process is well underway, reliance upon the civil record will expedite, not delay, the administrative process by eliminating the need for duplicative discovery in this forum.
- e. Moreover, it would be unfair and unkind to the fact witnesses, many of whom claim to be traumatized by what they witnessed, to subject them to duplicative depositions in parallel civil and administrative litigation unless absolutely necessary.

15. Dismissal and, if necessary, a later refile of this Complaint, or holding this Complaint in abeyance, will not cause undue delay or prejudice. This consolidated investigation will permit Staff to supplement its Report, as it already stated will be necessary, and if Staff believes that adversary proceedings against MGE or others are supported by the evidence, will allow Staff to present to the Commission a new Complaint based upon detailed and accurate facts, rather than generalizations or assumptions. This should hopefully eliminate the need to re-litigate many of the basic facts related to the Incident before the Commission is asked to determine the

regulatory issues presented. The need for discovery in this administrative action will be greatly curtailed because the witnesses' sworn testimony in the civil action will already be available to the Staff and MGE. Not only will the public reap the benefits of an efficient process, but that process will be much more likely to result in findings of fact that the Commission can be confident will not be disproven or contradicted in any subsequent civil litigation.

16. MGE does not seek procedural advantage with this request. MGE does not object to this docket remaining open, pending an adequate opportunity for the Staff to review and digest the facts being established in the civil litigation. In the civil litigation, the parties, and the Special Master, have been charged by the Court to set aside two weeks per month for the fact witness depositions and to proceed without delay until those depositions are complete. Using the same sworn testimony in this proceeding will level the playing field and allow for a more prompt, and accurate, determination of the facts.

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.

Wherefore, MGE respectfully suggests that the Complaint be dismissed without prejudice, or that this matter be held in abeyance, and that Staff be directed to provide a more complete and definite statement of the basis of its claims after having considered the full and complete factual record developed in the consolidated civil actions.

MGE also suggests that the Commission re-open Case No. GS-2013-0400 so that Staff may file an amended report after reviewing all the evidence.

Respectfully submitted

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ATTORNEYS FOR RESPONDENT LACLEDE GAS
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2014, a true and accurate copy of the foregoing was filed electronically with the Missouri Public Service Commission, Staff of the Missouri Public Service Commission, and the Office of Public Counsel:

/s/ Rick Zucker