

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

In the matter of the Application of)
Southern Missouri Gas Company, L.P.)
d/b/a Southern Missouri Natural Gas)
for a certificate of public convenience)
and necessity authorizing it to construct,) Case No. GA-2007-0212
install, own, operate, control, manage)
and maintain a natural gas distribution)
system to provide gas service in)
Lebanon, Missouri.)

In the matter of the Application of)
Southern Missouri Gas Company, L.P.)
d/b/a Southern Missouri Natural Gas) Case No. GF-2007-0215
for Authority To Issue approximately \$10 Million)
in Equity Capital and approximately \$50 Million In)
Notes and Other Forms of Indebtedness.)

In the matter of the Application of)
Southern Missouri Gas Company, L.P.)
d/b/a Southern Missouri Natural Gas)
for a certificate of public convenience)
and necessity authorizing it to construct,) Case No. GA-2007-0310
install, own, operate, control, manage)
and maintain a natural gas distribution)
system to provide gas service in)
Houston, Licking, and Mountain View, Missouri.)

**RESPONSE OF SOUTHERN MISSOURI NATURAL GAS TO THE STAFF RESPONSE
TO COMMISSION ORDER DIRECTING FILING OF STAFF RECOMMENDATION,
AND MPGA'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO STAY
PROCEEDINGS.**

COMES NOW Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas,
("SMNG" or "Company"), and pursuant to 4 CSR 240-2.080, files its Response to the Staff Response
To Commission Order Directing Filing of Staff Recommendation filed on May 15, 2007, and to the
Motion To Dismiss Or In The Alternative To Stay Proceedings by the Missouri Propane Gas

Association (MPGA) filed on May 16, 2007. For its Response, SMNG respectfully states as follows:

1. On December 6, 2006, SMNG filed an Application for a certificate of convenience and necessity to provide natural gas service in Lebanon, Missouri. This case was designated as Case No. GA-2007-0212 and subsequently consolidated with Case Nos. GF-2007-0215 and GA-2007-0310.

2. On May 15, 2007, Staff filed its Staff Response To Commission Order Directing Filing Of Staff Recommendation ("Staff Response") which stated:

Staff anticipates providing the Company a draft of its proposed recommendation by May 22 to determine if Staff and the Company can resolve any remaining outstanding issues. Staff will request that the Company respond as soon as possible after being provided the draft, but, in any event, within two weeks. After Staff receives the Company's comments, it will notify the Commission within forty-eight hours after receipt, and, within two weeks after receipt of the Company's comments, will provide the commission a final recommendation, a stipulation and agreement, or a statement that there is an agreement in principle. (Staff Response, p. 2)

3. Having reviewed the Staff Response, SMNG wishes to inform the Commission that the approach suggested by Staff for resolving the final issues in this matter is acceptable to the Company. It is critically important to the Company, however, that the process move forward as quickly as possible since the construction season has already begun, and it is the Company's intent to bring natural gas service to Lebanon, Houston and Licking as soon as practicable.¹ Substantial delays in the regulatory process will make it impossible for SMNG to provide consumers in its proposed service area with natural gas service during the upcoming winter heating season.

4. One day after the Commission Staff filed its Staff Response which indicated that Staff would be working with SMNG to resolve all remaining issues, the MPGA on May 16, 2007,

¹ SMNG is no longer seeking a certificate of convenience and necessity to serve the municipality of Mountain View, Missouri. After discussions with the City Council in Mountain View, it has been determined that the City of

filed its Motion To Dismiss Or In The Alternative To Stay Proceedings requesting that the Commission should dismiss the Application, or alternatively, stay any determination pending the outcome of the City of Lebanon franchise election. (MPGA Motion, p. 3) In its Motion, MPGA alleged "Southern Missouri Gas Company d/b/a Southern Missouri Natural Gas (SMNG) does not have the requisite franchises or other consents in order to be granted a certificate of convenience and necessity in this Matter and its application in this Matter should be dismissed for good cause shown, pursuant to 4 CSR 240-2.116, or ordered stayed until SMNG provides proof of required consent by the local governments to be served." (MPGA Motion, p. 1). For the reasons stated herein, MPGA's Motion should be denied.

5. As noted by MPGA, SMNG filed Appendix F to its Application which contained Ordinance No. 4457, granting SMNG a franchise to provide natural gas service within the municipality of Lebanon, Missouri. MPGA has not challenged the provisions of the ordinance itself which granted SMNG a municipal franchise. However, MPGA noted in its Motion that it had sent correspondence to counsel to the City of Lebanon and counsel for SMNG challenging the legality of the purported grant of a natural gas franchise by Ordinance No. 4457 on the erroneous ground that the franchise must be ratified by a vote of the people. (MPGA Motion, p. 2)

6. During the discussions with the City of Lebanon regarding the adoption of Ordinance No. 4457, SMNG representatives inquired of the City of Lebanon officials whether municipal statutes would require a ratification vote on the ordinance. SMNG representatives were told by City officials that no such ratification vote would be required under the terms of Section 88.251 RSMo 2000 (attached), unless twenty-five percent of the voters petitioned for a ratification election.

Mountain View is not interested in receiving natural gas service at this time.

Section 88.251 provides that in part:

“the effective date of such franchise or contract shall be the earliest date upon which one of the following events occurs: the bill approving the franchise or contract is signed by the mayor or person exercising the duties of the mayor’s office; the board of alderman overrides the mayor’s veto; or the conclusion of the next meeting of the board of aldermen when the mayor has neither signed nor vetoed the bill. Every such franchise or contract provided for above shall be subject to approval or disapproval of the voters of such city whenever twenty-five percent of the voters of such city, as appears from the number of voters who voted for mayor at the last preceding municipal election, filed with the city clerk, within thirty days after the passing of the franchise or contract, a petition, in the following form, calling for the submission of the question of approval or disapproval of the grant of the franchise or contract to the voters of such city at a special election or at a regular municipal election. . . (Emphasis added.)

7. Relying upon the expert legal advice of the City of Lebanon and its City Attorney and its own review of Section 88.251, SNMG concluded that it had a valid franchise from the City of Lebanon without any further elections. On December 6, 2006, SMNG filed its Application for a certificate of convenience and necessity which included evidence of the approval of the Lebanon franchise in the form of a copy of Ordinance No. 4457, as required by Commission Rule 4 CSR 240-3.205.

8. On or about April 13, 2007, the undersigned counsel received a letter from Charles W. Hatfield, counsel for the MPGA, threatening to file a Petition for Declaratory Judgment and Injunctive Relief against the City of Lebanon to challenge the validity of the franchise granted to SMNG by the City of Lebanon (copy of the letter is attached to MPGA’s Motion as Exhibit 2). Mr. David Wilheit, the City Attorney for the City of Lebanon, also informed the undersigned that the City had received a similar letter threatening a lawsuit by the MPGA. While MPGA makes a point in its Motion of the fact that it received no response to its veiled threats, the City of Lebanon and SMNG were not obligated to expend their respective

citizen's and owners' funds to respond in any way to such threats brought by an association that represents propane competitors whose primary interest in this proceeding is to slow or eliminate any competition from the provision of natural gas service for Lebanon's consuming public.

9. In his April 12, 2007, letter to counsel for SMNG, Mr. Hatfield argues that Section 77.210 RSMo requires a natural gas franchise be approved by a majority of the votes in the city in order for it to be granted. He further states: "We understand that there is a general provision applicable to cities, towns and villages that does not require a vote." (MPGA Motion, Exhibit 2). However, Mr. Hatfield fails to cite the general statutory provision to which he refers, and he does not specifically address the provisions of Section 88.251 discussed above. In fact, Section 88.251 specifically refers to Section 77.210 when it states: "Each franchise or contract provided for in section 71.530, RSMo, **77.210, RSMo**, 78.190, 78.630, RSMo, and sections 88.613, 88.770, and 88.773 shall remain on file with the city clerk for public inspection at least thirty days before the final passage or adoption thereof." (*Emphasis added*). Under the procedures set forth in Section 88.251, a ratification vote is not required unless twenty-five percent of the voters petition for an election.

Contrary to the arguments of Mr. Hatfield, Section 77.210 was not a "later enacted requirement" since Section 88.251 was last amended in 1996 in H.B. 1557 & 1489. Section 77.210 was more recently enacted in 1987. As Mr. Hatfield seems to recognize in his April 12, 2007, letter, "statutory construction requires a conclusion that the City is bound by the more specific and later enacted requirements..." (MPGA Motion, Exhibit 2, p. 1)

10. While both the City and SMNG are confident in the validity of the franchise granted to SMNG utilizing the simplified procedures contained in Section 88.251, the City and

SMNG recognized that a legal challenge brought by MPGA could potentially delay the provision of natural gas to Lebanon's citizens for months or years while the litigation is pending. In order to avoid a needless delay in the provision of natural gas service to the citizens of Lebanon, the City chose a "belts and suspenders" approach and decided to schedule a ratification election for August 7, 2007. The scheduling of this election, however, does not invalidate the franchise that was granted to SMNG under Section 88.251 procedures. It merely renders moot any potential challenge of the MPGA to the validity of the franchise on the ground that no ratification election was held.

11. In a further attempt to disparage SMNG's efforts to receive a timely certificate of convenience and necessity to serve the Lebanon area, MPGA makes the unfounded and unsupported assertion that "SMNG repeatedly and continually failed to provide complete answers to the Data Requests from PSC staff." (MPGA Motion, p. 3). This assertion is simply untrue. SMNG has responded to all outstanding Staff Data Requests as of the date of this filing. In the vast majority of instances, SMNG has responded to Staff Data Requests within a matter of a few days of receipt. For a small number of Staff Data Requests, SMNG sought clarifications of Staff regarding the requested information in conference calls with Staff, and SMNG responses to those data requests were quickly forthcoming following Staff's clarifications. To the extent that the Staff's Status Reports of April 13 and February 27, 2007 Status Report reflect that "Staff has not yet received complete answers to some of the data requests already issued," it is SMNG's understanding that such statements merely reflected that the Staff had an ongoing investigation that had not been completed, and not that SMNG was being unresponsive to Staff's efforts to obtain relevant information. As the Commission knows, Staff has not filed any motions to

compel or other pleadings in this proceeding seeking to compel answers to Staff Data Requests. It is disingenuous for MPGA to take a sentence out of context from the Staff's Status Report and erroneously suggest to the Commission that SMNG has "repeatedly and continually failed to provide complete answers to the Data Requests from PSC staff." (MPGA Motion, p. 3).

12. Having explained that the Lebanon franchise is valid under Section 88.251, SMNG would urge the Commission to adopt the approach recommended by Staff in its May 15, 2007, Response To Order Directing Filing for processing this case. This proceeding should not be dismissed or held in abeyance, as requested by MPGA, merely to wait for the results of the August 7, 2007 election. In previous certificate cases involving SMNG's predecessor company (e.g., Case No. GA-94-127 and Case No. GA-95-349), the Commission continued to address the various regulatory issues even though there were ratification elections scheduled in various municipalities. The Commission should follow this same approach in this proceeding, and proceed forward to address the regulatory issues, and issue its Order Approving Certificate at its earliest convenience.

WHEREFORE Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas respectfully requests that the Commission accept its Response, and deny MPGA's Motion filed in this matter on May 16, 2007.

Respectfully submitted,

/s/ James M. Fischer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, by U.S. Mail, First Class, this 22nd day of May, 2007, to:

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/s/ James M. Fischer

James M. Fischer

Missouri Revised Statutes

Chapter 88

Public Works and Special Assessments Therefor--Condemnation

Section 88.251

August 28, 2006

Utilities, franchises and contracts, procedure to grant, extend or renew--ballot form--majority vote required--notice required.

88.251. Each franchise or contract provided for in sections 71.530, RSMo, 77.210, RSMo, 78.190, 78.630, RSMo, and sections 88.613, 88.770, and 88.773 shall remain on file with the city clerk for public inspection at least thirty days before the final passage or adoption thereof. The effective date of such franchise or contract shall be the earliest date upon which one of the following events occurs: the bill approving the franchise or contract is signed by the mayor or person exercising the duties of the mayor's office; the board of aldermen overrides the mayor's veto; or the conclusion of the next meeting of the board of aldermen when the mayor has neither signed nor vetoed the bill. Every such franchise or contract provided for above shall be subject to approval or disapproval of the voters of such city whenever twenty-five percent of the voters of such city, as appears from the number of voters who voted for mayor at the last preceding municipal election, file with the city clerk, within thirty days after the passing of the franchise or contract, a petition, in the following form, calling for the submission of the question of approval or disapproval of the grant of the franchise or contract to the voters of such city at a special election or at a regular municipal election:

To the city clerk of.

We, the undersigned, hereby request the appropriate election authority to submit the grant of the following franchise or contract to the electors of at a special election or at a regular municipal election.

(State nature of franchise or contract.)

Upon receipt of such a petition by the city clerk, it shall be the duty of the city clerk to determine whether the petition has presented the question in the form required by this section and whether the petition has been executed in compliance with the terms of subsection 4 of section 115.019, RSMo. If the petition satisfies the requirements of this section and subsection 4 of section 115.019, RSMo, the city clerk shall cause the appropriate election authority to give notice of an election and to submit the question of approval or disapproval of the grant of the franchise or contract to the voters at a special election, or at a regular municipal election. Not later than the tenth Tuesday prior to an election, the city clerk shall send to the appropriate election authority a certified copy of the legal notice to be published. The legal notice shall include the particular question to be voted on at such election, the date and time of the election and a sample ballot. The appropriate election authority shall cause legal notice of such election to be published as required in chapter 115, RSMo. The ballots used when voting upon such franchise or contract shall contain, but not be limited to, the following language:

Shall the city of (name of city) enter into the contract to (State nature of proposed contract or franchise)?

â ã YES â ã NO

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

If a majority of the voters voting on that issue vote against such franchise or contract, the same shall no longer be effective on the date the election authority certifies the election results. If a majority of the qualified voters voting on such proposed franchise or contract shall vote in favor thereof, such franchise or contract shall continue to be an effective, valid and binding franchise or contract of the city and shall remain in full force and effect and cannot be repealed or amended. Nothing contained herein shall be interpreted to prohibit the granting of a franchise by the use of the right of initiative petition.

(L. 1987 S.B. 412 § 1, A.L. 1989 H.B. 451, A.L. 1996 H.B. 1557 & 1489)

Effective 6-13-96

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