Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF THE VERIFIED APPLICATION AND PETITION OF LIBERTY ENERGY (MIDSTATES) CORP. D/B/A LIBERTY UTILITIES TO CHANGE ITS INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE,	)	
	)	**Case No. SC94470**
MISSOURI PUBLIC SERVICE COMMISSION, RESPONDENTS,	)	
vs.	)	
THE OFFICE OF THE PUBLIC COUNSEL, APPELLANT.	)	

Appeal from the
Missouri Public Service Commission

SUBSTITUTE BRIEF OF RESPONDENT LIBERTY UTILITIES

Larry W. Dority – Mo. Bar #25617
FISCHER & DORITY, P.C.
101 Madison, Suite 400
Jefferson City, MO 65101
Telephone: 573-636-6758
Facsimile: 573-636-0383
E-mail: lwdority@sprintmail.com

Attorneys for Respondent
Liberty Utilities

January 26, 2015

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

TABLE OF CONTENTS

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

TABLE OF AUTHORITIES

Cases

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Statutes

Regulations

Other Authorities

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

JURISDICTIONAL STATEMENT

Pursuant to Section 386.510, RSMo Cum. Supp. 2013,[1] the Office of the Public Counsel ("OPC" or "Public Counsel") appeals the Report and Order issued by the Missouri Public Service Commission ("Commission" or "PSC") on October 16, 2013, effective October 30, 2013, in Case No. GO-2014-0006, *In the Matter of the Verified Application and Petition of Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities to Change Its Infrastructure System Replacement Surcharge*.[2]

The Western District of the Missouri Court of Appeals issued its opinion affirming the Commission's Report and Order in this matter on July 29, 2014, in Case No. WD77089. OPC moved the Western District to rehear the matter or alternatively transfer it to this Court. The Western District denied both motions.

After OPC sought transfer of the case pursuant to Rule 83.04 of the Missouri Supreme Court Rules, this Court granted transfer on November 25, 2014.

[1] Statutory references are to the Revised Statutes of Missouri (RSMo) 2000, as updated by the 2013 Cumulative Supplement.

[2] Legal File (L.F.) p. 250.

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

STATEMENT OF FACTS

Respondent Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty Utilities") respectfully submits that OPC's Initial Substitute Brief, particularly "Section A. Background" commencing at page 7 therein, violates Rule 84.04(c) calling for a statement of facts "without argument." In accordance with Rule 84.04(f), Liberty Utilities provides its Statement of Facts to the Court. Liberty Utilities is a Missouri corporation and natural gas provider subject to the regulatory jurisdiction of the Commission as provided in Chapters 386 and 393, RSMo.[3] The Commission is a state administrative agency responsible for the regulation of public utilities, including gas corporations, in Missouri, pursuant to Sections 386.040 and 386.250(1). (L.F. p. 259). Liberty Utilities is a "gas corporation" and a "public utility" as each of those phrases is defined in Section 386.020, RSMo. (L.F. p. 253). The Staff of the Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless

[3] As noted during the course of the underlying proceeding, while Respondent Liberty Utilities continues to do business under the fictitious name Liberty Utilities, the name of the corporation was changed to Liberty Utilities (Midstates Natural Gas) Corp. (L.F. Ex. 1, p. 2). By its *Order Granting Application* issued on October 17, 2013 and effective November 1, 2013 in Case No. GN-2014-0090, the Commission granted the application and recognized the name change of Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities to Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities. (L.F. p. 347).

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

it timely files a notice of its intention not to participate in the proceeding. (*Id.*). The Public Counsel, at its discretion, may represent consumers in all utility proceedings before the Commission and in all appeals of Commission orders. (*Id.*).

In 2012, the Commission authorized Atmos Energy Corporation ("Atmos") to sell, and Liberty Utilities to purchase, substantially all of the assets of Atmos used to provide natural gas and transportation services in Missouri. The Commission issued new certificates of convenience and necessity to Liberty Utilities for the service areas formerly served by Atmos and approved Liberty Utilities' adoption of Atmos' tariffs. (L.F. Ex. 1 p. 4-5). Among the tariff sheets adopted was Atmos' Infrastructure System Replacement Surcharge ("ISRS") tariff. Liberty Utilities is unique among Missouri natural gas local distribution companies in that it has specific ISRS rates for each of its three districts (as did its predecessor, Atmos). (L.F. p. 255).

Sections 393.1009, 393.1012 and 393.1015, RSMo (the "ISRS statutes"), permit gas corporations to recover certain infrastructure system replacement costs outside a formal rate case through a surcharge on their customers' bills. (L.F. pp. 254-255). Pursuant to the provisions of those sections and Commission Rule 4 CSR 240-3.265, Liberty Utilities filed its *Verified Application and Petition of Liberty Utilities to Change its Infrastructure System Replacement Surcharge* ("Petition") with the Commission on July 2, 2013, initiating Case No. GO-2014-0006. (L.F. p. 4). The Petition sought an adjustment to Liberty Utilities' ISRS rate schedule that provided for recovery of costs incurred in connection with ISRS-eligible infrastructure system replacements made

during the period beginning June 1, 2012 through May 31, 2013. (L.F. p. 252). The Commission suspended the revised ISRS tariff sheet until October 30, 2013. (*Id*.).

This particular ISRS filing represented Liberty Utilities' second ISRS filing since acquiring the Missouri assets previously owned by Atmos; however, this was the first filing using information specific to Liberty Utilities. The Petition and supporting documentation filed in this matter were virtually identical in form and scope to the four (4) previous ISRS filings submitted by Liberty Utilities or Atmos, dating back to August of 2008. Each of those cases was resolved by the company filing a notice of agreement with the staff recommendation and a Commission order approving a revised tariff filed in conformance with such agreement. (L.F. Ex. 1 pp. 9-10). In those previous cases, Public Counsel did not raise the objections it asserted against Liberty Utilities in this matter. (L.F. p. 255).

Pursuant to Section 393.1015.2, RSMo, when a petition to establish or change an ISRS is filed, the Commission is required to conduct an examination of the proposed ISRS. In connection with the Commission's examination, the Staff may examine information to confirm that the underlying costs are in accordance with the ISRS code provisions (sections 393.1009 to 393.1015) and to confirm that the proposed charges are appropriately calculated. The findings and determinations of Staff's examination may be submitted to the Commission as a report not later than sixty days after the petition is filed. In this case, the Company filed a petition to change its authorized ISRS, the Staff undertook an examination as described above, and the Staff submitted its initial Report to the Commission in accordance with the Commission's directive on September 3, 2013.

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

(L.F. p. 41). The Company filed its Notice of Agreement with that Report on September 13. (L.F. p. 79). Staff updated its report on September 20, 2013 and September 26, 2013, providing amended revenue figures and rates by customer class based on additional data provided by Liberty Utilities. (L.F. p. 252). Liberty Utilities agreed with Staff's updated calculations and recommendations. (L.F. p. 257).

On September 9, 2013, Public Counsel filed a motion requesting that the Commission reject the ISRS petition or schedule an evidentiary hearing. The Commission held an evidentiary hearing on September 26, 2013 in response to the OPC request for hearing. (L.F. p. 252; Transcript, Volume 1). The Commission admitted the testimony of six witnesses and six exhibits into evidence. (*Id.*) Public Counsel did not present any evidence that Staff's ISRS calculations were incorrect or provide evidence of an ISRS revenue requirement or rates based on Public Counsel's own calculations. (L.F. p. 257). The Commission found that Staff's witnesses were more credible than Public Counsel's witness regarding evaluation of the Liberty Utilities ISRS request because the testimony of Staff's witnesses was more detailed and precise. (L.F. p. 256). Post-hearing briefs were filed on October 4, 2013, and the case was deemed submitted for the Commission's decision on that date. (L.F. p. 252).

The Commission issued its Report and Order on October 16, 2013, effective October 30, 2013, authorizing Liberty Utilities an incremental ISRS revenue requirement increase of $579,662 in total for this case, consisting of $30,432 for the WEMO district, $178,799 for the SEMO district, and $370,430 for the NEMO district. (L.F. pp. 267-268). The original ISRS tariff sheet filed on July 2, 2013, was rejected, and Liberty

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Utilities was authorized to file a new tariff reflecting the composite/cumulative ISRS rate for each customer class by district as reflected in Staff Exhibit 3. (*Id*.).

Liberty Utilities filed its compliance tariff and accompanying motion for expedited treatment, and the Commission's Order Approving Tariff Filing in Compliance with Commission Order was issued on October 18, 2013. Public Counsel filed an Amended Application for Rehearing on October 25, 2013, and the Commission issued its Order Denying Application for Rehearing on November 13, 2013. (L.F. pp. 305, 329).

On December 12, 2013, Public Counsel filed with the Commission its Notice of Appeal to the Western District of the Court of Appeals. (L.F. p. 353). The Western District Court of Appeals affirmed the Commission's Report and Order. *In re Liberty Energy (Midstates) Corp.*, 2014 WL 3721798 (Mo. App. W.D. July 29, 2014). (*See* Appendix to Substitute Brief of Respondent Liberty Utilities).

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

POINTS AND AUTHORITIES RELIED ON

POINT I

THE PUBLIC SERVICE COMMISSION DID NOT ERR IN APPROVING AN INCREASE TO LIBERTY UTILITIES' INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE (ISRS) BECAUSE THE REPORT AND ORDER IS LAWFUL AND REASONABLE, IN THAT THE REVISED ISRS RATE SCHEDULE RECOVERS COSTS FOR PROJECTS THAT ARE ELIGIBLE PROJECTS WITHIN THE MEANING OF SECTIONS 393.1009, 393.1012 AND 393.1015, RSMO.

(RESPONSE TO PUBLIC COUNSEL POINT I)

Statutes

Section 393.130, RSMo

Section 393.1009, RSMo

Section 393.1012, RSMo

Section 393.1015, RSMo

Rules:

4 CSR 240-40.030

Cases:

Evans v. Empire Dist. Elec. Co., 346 S.W.3d 313 (Mo. App. W.D. 2011)

In re Laclede Gas Co., 417 S.W.3d 815 (Mo. App. W.D. 2014)

State ex rel. Office of the Pub. Counsel and Mo. Indus. Energy Consumers v. Mo. Pub. Serv. Comm'n, 331 S.W.3d 677 (Mo. App. W.D. 2011)

State ex rel. Womack v. Rolf, 173 S.W.3d 634 (Mo. 2005)

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

ARGUMENT

Standard of Review

"[T]he appellate standard of review of a PSC order is two-pronged: 'first, the reviewing court must determine whether the order is lawful; and second, the court must determine whether the order is reasonable." *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003)(quoting *State ex rel. Atmos Energy Corp v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003)). "The lawfulness of a PSC Order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*." *AG Processing, Inc.*, 120 S.W.3d at 734. If the Commission's order is found to be lawful, the reviewing court must then determine whether it is reasonable. A PSC order is reasonable "'where the order is supported by competent evidence on the whole record; the decision is not arbitrary or capricious [;] or where the [PSC] has not abused its discretion.'" *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. banc 2011), quoting *Envtl. Utils., LLC v. Pub. Serv. Comm'n*, 219 S.W.3d 256, 265 (Mo. App. 2007).

A Commission order is presumed valid. *State ex rel. Office of Public Counsel v. Public Service Commission*, 289 S.W.3d 240, 246 (Mo. Ct. App. W.D. 2009). Challengers have the burden to prove it invalid. *Id.* The reviewing court will not substitute its judgment for that of the Commission on issues within the realm of the Commission's expertise. *Id.* at 247.

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

POINT I

THE PUBLIC SERVICE COMMISSION DID NOT ERR IN APPROVING AN INCREASE TO LIBERTY UTILITIES' INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE (ISRS) BECAUSE THE REPORT AND ORDER IS LAWFUL AND REASONABLE, IN THAT THE REVISED ISRS RATE SCHEDULE RECOVERS COSTS FOR PROJECTS THAT ARE ELIGIBLE PROJECTS WITHIN THE MEANING OF SECTIONS 393.1009, 393.1012 AND 393.1015, RSMO. (RESPONSE TO PUBLIC COUNSEL POINT I)

A. Background

This case presents the limited issue of whether the Commission properly determined that certain costs incurred by Liberty Utilities to replace and make safe infrastructure that had been damaged by a third party were recoverable through Liberty Utilities' ISRS. Codified at Sections 393.1009 to 393.1015, RSMo, the ISRS statutes and implementing rule (4 CSR 240-3.265) were designed, among other things, to eliminate the disincentives that natural gas companies would otherwise have to make incremental investments in infrastructure improvements that generate no new revenues. These improvements include those required to operate safe and reliable natural gas systems and to relocate facilities to accommodate public improvement projects. These disincentives were removed by allowing natural gas companies to begin recovering these

incremental investments without a full rate case. Similar provisions were also enacted to remove disincentives for water companies to make such investments.[4]

Liberty Utilities' expert witness Mark D. Caudill, a highly respected regulatory consultant with broad experience concerning infrastructure replacement rate mechanisms, addressed the public policy considerations inherent in such mechanisms:

> The fundamentals of the Missouri provisions compare favorably with some of the better provisions in other jurisdictions. Because safe and reliable natural gas pipeline and distribution systems are essential to public health, safety and welfare, it is good public policy to eliminate disincentives that would inhibit natural gas system operators from making timely system repairs, modifications and replacements. It is virtually impossible to forecast accurately the revenue requirements associated with such fundamental safety obligations and establish sustainable revenue requirements through traditional ratemaking forecasts. Moreover, the nature and timing of most relocation, safety, and system integrity investments and expenditures are not within the control of system operators. Consequently, consumers and the general public are well served by establishing revenue mechanisms that recover associated revenue requirements not otherwise provided for in base rates. The Missouri ISRS code provisions allow the Commission to authorize that type of revenue mechanism for the natural gas companies it regulates. (L.F. Ex. No. 2, p. 110).

[4] Sections 393.1000, 393.1003 and 393.1006, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Section 393.1009(3), RSMo defines "Eligible infrastructure system replacements" as gas utility plant projects that: (a) Do not increase revenues by directly connecting the infrastructure replacement to new customers; (b) Are in service and used and useful; (c) Were not included in the gas corporation's rate base in its most recent general rate case; and (d) Replace or extend the useful life of an existing infrastructure.

Pursuant to Section 393.1009(5), "Gas utility plant projects" may consist only of the following: (a) Mains, valves, service lines, regulator stations, vaults, and other pipeline system components installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition; (b) Main relining projects, service line insertion projects, joint encapsulation projects, and other similar projects extending the useful life or enhancing the integrity of pipeline system components undertaken to comply with state or federal safety requirements; and (c) Facility relocations required due to construction or improvement of a highway, road, street, public way or other public work by or on behalf of the United States, this state, a political subdivision of this state, or another entity having the power of eminent domain provided that the costs related to such projects have not been reimbursed to the gas corporation. Section 393.1009(5), RSMo.

B. The Commission's Interpretation is Consistent with the Plain and Ordinary Meaning of "Worn Out or Are In Deteriorated Condition."

Public Counsel has placed at issue in this case the Commission's interpretation and application of the above-referenced Section 393.1009(5)(a), RSMo, alleging that

allowing the ISRS to include costs incurred replacing damaged or destroyed facilities is unlawful. According to Public Counsel, "[t]he primary question presented by this case is whether infrastructure, such as a main line ruptured by way of an accident, satisfies the statutory limitation that ISRS-eligible replacements only include infrastructure that is 'worn out or are in deteriorated condition.' § 393.1009(5)(a)." (Appellant's Initial Substitute Brief, p. 22). "The PSC incorrectly interpreted this language to allow costs incurred replacing infrastructure that was damaged or destroyed due to human conduct, such as when a pipe is accidentally ruptured during excavation or boring activities." (*Id*., p. 32).

To the contrary, the Commission properly determined such damaged facilities to be in deteriorated condition under the plain language of Section 393.1009(5)(a). "The PSC has been given the statutory authority to interpret statutes pursuant to the administration of their charge; the PSC's interpretation is afforded great weight by Missouri courts. . . . (W)hen the PSC is confronted with a new or amended statute, it must take that statute and interpret its meaning and application to the facts at hand." *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011) (internal citations omitted).

A reviewing court's goal in construing a statute "is to ascertain the intent of the legislature from the language used and, if possible, give effect to that intent." *In re Laclede Gas Co.*, 417 S.W.3d 815, 820 (Mo. App. W.D. 2014) (internal citation omitted). Courts consider the plain and ordinary meaning of the words used in the statute. *State ex rel. Office of Pub. Counsel and Mo. Indus. Energy Consumers v. Mo. Pub. Serv.*

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Comm'n, 331 S.W.3d 677, 683 (Mo. App. W.D. 2011). "[E]ach word, clause, sentence and section of a statute should be given meaning. Courts will reject an interpretation of a statute that requires ignoring the very words of the statute." *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. 2005).

Public Counsel's point of error is incorrect because a plain and ordinary reading of Section 393.1009(5)(a) and (b), and an assessment of the legislature's intent based on the language used, shows that the Commission's decision – rejecting the Public Counsel's interpretation as too narrow – is consistent with the scope of eligible projects found in Section 393.1009(5).

Addressing Public Counsel's argument, the Commission concluded as follows:

> While an unspecified number of Liberty's projects may have resulted from the actions of a third party, that fact does not necessarily make them ineligible. Public Counsel argues that to repair or replace such damage does not constitute replacing a facility that has worn out or is in a deteriorated condition. "Deteriorated" is not defined in the statute, but has been defined commonly as "to lower in quality, character, or value." (Footnote, *The American Heritage Dictionary*, Second College Edition, p. 387). A pipe damaged by a third party is in a deteriorated condition and, therefore, an eligible project because it has been lowered in quality, character, or value, although that deterioration has occurred quicker than what happens normally through the passage of time. In addition, these projects and the capitalized leak repairs performed by Liberty also qualify

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

> as eligible projects because they are "similar projects extending the useful life or enhancing the integrity of pipeline system components . . ." (Footnote: Section 393.1009(5)(b), RSMo Supp. 2012). (L.F. p. 263).

As noted by the Commission, the term "deteriorated" is not defined in Chapter 393. "In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary." *State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 498 (Mo. banc 2012). In addition to The American Heritage Dictionary definition utilized by the Commission, *Webster's Third New International Dictionary of the English Language Unabridged* (1993) at 616 defines the term "deteriorate" as: "to make inferior in quality or value: IMPAIR"; "to grow worse"; "become impaired in quality, state, or condition: DEGENERATE." This clearly conforms to, and supports, the Commission's determination that damaged facilities are in a deteriorated condition as they have been made inferior or become impaired (or lowered) in quality, character or value. And while the term may also describe diminution occurring gradually over time, the definition clearly is not restricted in the manner that Public Counsel would suggest; rather, it is broadly defined, supporting the Commission's determination made herein.

If the legislature had intended to embrace Public Counsel's interpretation of limiting eligible projects to those in poor condition because of age or the passage of time, it could have used the phrase "worn out" as opposed to "worn out or in deteriorated condition." As noted above, courts presume that the legislature intended for each word and phrase of a statute to have effect and that the legislature did not include "idle

verbiage or superfluous language." *Office of Public Counsel*, 331 S.W.3d at 684. Public Counsel's interpretation renders the words "or in deteriorated condition" superfluous and meaningless.

The Public Counsel's position that a damaged facility is not "deteriorated" is antithetical to the purpose of the ISRS statutes and the Commission's overarching responsibility to promote public health and safety interests. It is the *condition* of the facility that determines eligibility; not the *cause* of its condition. Despite Public Counsel's protestations and strained analysis, a family (or employees/patrons of a commercial establishment) whose safety is put at risk because a pipeline system component is in an unsafe condition doesn't care if such condition occurred over time (how long is gradual?) or suddenly; whether it is "lowered to an unsafe condition but still operable" or "rendered useless"; or whether a fracture or break (sudden or otherwise) is the result of corrosion, ground settling, seismic shift or an excavation. What the family is concerned about is the end result of an unsafe condition, which is what the state and federal safety rules and the ISRS were designed to prevent.

C. There Is No Need To Look Beyond the Plain Meaning of the Statute, and Public Counsel's "Legislative Intent" Analysis Is Flawed.

A court looks beyond the plan meaning of the statute only when the language is ambiguous or will lead to an absurd or illogical result. *Laclede*, 417 S.W.3d at 820 (citation omitted). As discussed above, the Commission properly determined that damaged facilities could be in deteriorated condition under the plain language of Section

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

393.1009(5)(a), RSMo. Accordingly, Liberty Utilities respectfully submits that there is no reason to look beyond the plain meaning of the statute. Nevertheless, as Public Counsel has provided the Court with its argument regarding the purported "legislative intent" behind the ISRS statute, Liberty Utilities submits that Public Counsel's argument and analysis is flawed and would, in reality, lead to a result not in the public interest.

Public Counsel suggests that "[t]he legislative intent with the ISRS statutes was to permit gas utilities to recoup expeditiously increased costs created by government-mandated replacement programs" and refers to some prior Accounting Authority Order ("AAO") cases ostensibly to support its theory. Public Counsel's purported "legislative history" and its strained analysis is actually based on regulatory history, about which the Commission itself would be most familiar and, accordingly, the Commission's interpretation should be afforded great weight. "The Commission concludes that the phrase 'to comply with state or federal safety requirements' in Section 393.1009(5)(a) and (5)(b) should be read more broadly than what Public Counsel suggests and does include general gas safety rules." (L.F. p. 263). And while Public Counsel cites the Commission's gas safety rules (appending the Order of Rulemaking from 1989 to its Brief), it appends only one subsection of the voluminous rules to its Brief – the one-page subsection addressing "Replacement Programs" – even though the ISRS statute specifically refers to "state or federal safety requirements." Section 393.1009(5), RSMo.

At Footnote 4 of its Brief (page 26), Public Counsel attributes the statement to Liberty that "the purpose of the legislation is to address the single issue of relief for natural gas utilities from regulatory lag attributable to safety-related infrastructure

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

investments." While agreeing that the reduction of regulatory lag associated with investments in non-revenue producing plant is a key component, Liberty actually was quoting the Commission's Staff from the Commission's ISRS Rulemaking proceeding: "It appears from the language and structure of Sections 393.1009 through 393.1015, that the purpose of the legislation is to address the single issue of relief for natural gas utilities from regulatory lag attributable to safety-related infrastructure investments." (Staff Exhibit No. 1 admitted in December 10, 2003 Public Hearing in Case No. GX-2004-0090, page 3). (L.F. Tr. p. 9). As noted previously, the legislation also addresses infrastructure investments to relocate facilities to accommodate public improvement projects.

The foundation of the Public Service Commission law is that "[t]he provisions of this chapter [Chapter 386] shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." Section 386.610, RSMo. Obviously, the public's safety is a critical concern of the Commission. As discussed by the Commission in its Order of Rulemaking promulgating the gas safety rules in 1989, "[t]o promote gas safety, the commission has broad powers, powers which expressly and inherently include the right, and the obligation, to ensure the safe delivery of this explosive and dangerous substance." *Missouri Register*, Volume 14, Number 23, December 1, 1989, page 1583. The Commission Staff's assistant manager-engineering of its natural gas department testified at the hearing that "the purpose of the proposed rule is to ensure the safe distribution of natural gas to Missouri's residents by establishing

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

permanent statewide gas safety regulations which either meet or exceed current federal and state requirements." *Id.*

As discussed above, ISRS eligibility is not narrowly restricted, as OPC's argument would suggest, as there are many undertakings by gas utilities that may be necessary to satisfy their overarching requirement to provide safe service (as mandated by Section 393.130.1, RSMo), and to comply with the myriad requirements of the Commission's (and federal) gas safety rules.[5] For example, 4 CSR 240-40.030(13)(B)(2) states "Each segment of pipeline that becomes unsafe must be replaced, repaired, or removed from service." The ISRS statute clearly encompasses the breadth of state or federal safety requirements. Obviously, had the legislature intended to simply limit the scope of such safety requirements to 4 CSR 240-40.030(15), Replacement Programs, it easily could have done so. It did not.

D. Notice of Supplemental Proceeding

The ISRS statute contains a number of consumer protections. The statute limits the length of time that a gas corporation can collect an ISRS without filing a rate case.

[5] 4 CSR 240-40.030 is entitled "Safety Standards – Transportation of Gas by Pipeline." It is derived from the federal safety standards in 49 CFR part 192, and prescribes minimum safety standards for the design, fabrication, installation, construction, metering, corrosion control, operation, maintenance, leak detection, repair and replacement of pipelines. (*See* Appendix for the complete copy of the forty-seven (47) pages of Rules).

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Section 393.1012.3, RSMo. It provides that the Commission is not bound by its approval of an ISRS and, during a subsequent general rate proceeding, may "undertake to review the prudence of such costs." Section 393.1015.8. It ensures the authority of the commission to review and consider infrastructure system replacement costs along with other costs during any general rate proceeding of any gas corporation. Section 393.1015.9. It requires gas corporations to reset the ISRS to zero upon resolution of a general rate case. Section 393.1015.6(1).

Public Counsel requests reversal of the Commission's Order on the sole basis that the Order allowed Liberty's ISRS rate to include costs incurred replacing damaged facilities. As the record, and the Commission's Report and Order, clearly reveal, "Public Counsel did not present any evidence that Staff's ISRS calculations were incorrect or provide evidence of an ISRS revenue requirement or rates based on Public Counsel's own calculations." (L.F. p. 257). Accordingly, while Respondent totally rejects Public Counsel's allegation of such error, as fully discussed herein, if the Court reverses the Commission's decision on such ground, Liberty Utilities agrees with Public Counsel that the Court should remand the matter to the Commission for further proceedings.

Liberty Utilities just completed a general rate proceeding before the Commission[6], in which the issues related to its ISRS were resolved by virtue of a partial stipulation and

[6] *In the Matter of Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities' Tariff Revisions Designed to Implement a General Rate Increase for Natural Gas Service*

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

agreement entered into by various parties, including Liberty Utilities and Public Counsel. That stipulation and agreement was approved by the Commission in its Report and Order issued on December 3, 2014.[7] The stipulation and agreement is a public record that can be accessed via the Commission's Electronic Filing and Information System.

Relating to the third party damage issue and this proceeding, the stipulation and agreement provides in part:

3. ISRS:

a. OPC has appealed the Commission's Report and Order ("Order") issued in Case No. GO-2014-0006, *In the Matter Of The Verified Application and Petition Of Liberty Energy (Midstates) Corp d/b/a Liberty Utilities To Change Its Infrastructure System Replacement Surcharge*, and the Missouri Court of Appeals – Western District issued its Opinion on July 29, 2014 in Case No. WD77089, affirming the Commission's Order. OPC is filing Post-Disposition Motions. The Signatories agree that the

---

in the Missouri Service Areas of the Company, Case No. GR-2014-0152, Report and Order issued December 3, 2014, effective January 2, 2015.

[7] Public Counsel filed an Application for Rehearing in that proceeding on December 30, 2014, and one of the issues on which Public Counsel sought rehearing was in regard to Liberty Utilities' ISRS. The Commission issued its Order Denying Application for Rehearing on January 21, 2015.

Company shall record a regulatory liability account in the amount of $111,149 (estimate to be trued-up later if OPC prevails on the issue) to be used as a regulatory mechanism to preserve funds that could be used to credit the Company's ratepayers in the event that a court of competent jurisdiction reverses and remands the Commission's decision in the above-referenced case. In the event that no court of competent jurisdiction reverses and remands the Commission's decision and said decision becomes final, then the amounts booked in the regulatory liability account shall be reversed and no amounts will be credited to the Company's ratepayers. If upon remand the refund determined by the Commission is less than the regulatory liability, then the difference shall be reversed.

b. The Company further agrees that it will exclude from all future ISRS filings costs associated with damage to infrastructure caused by Company or third parties.

As noted above, the terms of the stipulation and agreement were approved and the signatories were ordered to comply with its terms pursuant to the Commission's Report and Order issued December 3, 2014, effective January 2, 2015, in Case No. GR-2014-0152.

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

CONCLUSION

The Commission's interpretation of the contested statute is lawful and reasonable and is consistent with the clear legislative intent. The Commission did not err in finding and concluding that Liberty Utilities' ISRS petition complied with the requirements of Sections 393.1009 to 393.1015, RSMo. Public Counsel has not satisfied its burden of demonstrating that the Commission's order is invalid. For all the foregoing reasons, this Court should affirm the Commission's Report and Order in its entirety.

Respectfully submitted,

/s/ Larry W. Dority

Larry W. Dority, MBN 25617
FISCHER & DORITY, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383
E-mail: lwdority@sprintmail.com

Attorneys for Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

RULE 84.04(h) STATEMENT

In accordance with Rule 84.04(h), Respondent Liberty Utilities states that the following materials have been included in the previously filed appendix accompanying Appellant's Substitute Brief and, therefore, are not included in the Appendix to Respondent Liberty Utilities' Substitute Brief:

PSC Report and Order, Case No. GO-2014-0006

§393.1009, RSMo

§393.1012, RSMo

§393.1015, RSMo

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,505 words (exclusive of cover, certificates of compliance and service, signature block and appendix), as calculated by Microsoft Word, the software used to prepare this brief.

/s/ Larry W. Dority

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 103.08, service of this brief is being made on this 26th day of January, 2015, through the electronic filing system. All parties are represented, and all attorneys of record are registered users.

/s/ Larry W. Dority

Electronically Filed - SUPREME COURT OF MISSOURI - January 26, 2015 - 09:31 AM