

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

FP Grandboro, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. GC-2008-0228
)	
Missouri Gas Energy,)	
)	
Respondent.)	

STAFF REPORT

COMES NOW Staff of the Public Service Commission of Missouri (Commission), and for its Report, states:

1. In its January 23, 2008 *Order Directing Staff To Investigate And File A Report* the Commission directed Staff to file a report concerning the results of its investigation no later than three weeks after Missouri Gas Energy (MGE) files its answer to FP Grandboro, LLC's complaint. In accordance with the Commission's Order, the Staff conducted its investigation and submits its Report attached hereto as Appendix A and incorporated by reference herein.

2. Complainant FP Grandboro, LLC owns a multi-unit residential complex situated in Grandview, Missouri, that operates under the name Sterling Point Apartments (hereinafter referred to as "SPA" or "Complainant").

3. In its Complaint, SPA disputes that MGE was justified in shutting off the gas to its entire complex, further asserting MGE over-reacted to what SPA contends was an isolated incident. For the reasons discussed in detail in Staff's attached Report, the Staff did not find any

tariff or Commission rule violations on the part of MGE from the actions it took to protect the ultimate safety of its customers.

4. In its prayer for relief, SPA seeks (1) Re-imbursement of replacement costs for 111 furnaces; (2) Re-imbursement of labor costs re: inspection and replacement of same; (3) Re-imbursement of expenses associated with financing of furnace replacements; (4) Loss of future income from departure of tenants who moved due to gas being shut off; and, (5) Attorney fees.

5. In response to SPA's request for an unspecified amount of re-imbursements and costs, the Commission has no authority to award Complainant such costs, fees, or damages even if the Commission were to decide this complaint in SPA's favor. While the Commission exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982), quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo. 1942). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." *State Tax Commission, supra*. The Public Service Commission is without authority to award money damages. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

6. Therefore, based on Staff's Report of its investigation, and because the Commission can not award the relief sought by Complainant even if the Commission should decide in favor of Complainant, the Staff recommends the Commission dismiss this Complaint.

WHEREFORE, the Staff respectfully submits its Report as directed by the Commission.

Respectfully submitted,

/s/ **Robert S. Berlin**

Robert S. Berlin

Senior Counsel

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Missouri Public Service Commission

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 14th day of March 2008.

/s/ **Robert S. Berlin**

STAFF REPORT

TO: Missouri Public Service Commission Official Case File,
Case No. GC-2008-0228, Missouri Gas Energy

FROM: Michael Ensrud, Tariff / Rate Design - Energy
Robert Leonberger, Gas Safety/Engineering

SUBJECT: Staff Recommendation concerning Shut-Off Complaint filed by
Sterling Point Apartments

DATE: March 14, 2008

/s/ Thomas M. Imhoff 3/14/08 /s/ Robert S. Berlin 3/14/08
Energy Department / Date General Counsel's Office / Date

BACKGROUND

On January 10, 2008 FP Grandboro, LLC filed a formal complaint against Missouri Gas Energy ("MGE") on behalf of Sterling Point Apartments ("Complainant" or "SPA").

SPA is a multi-unit residential complex situated in Grandview, Missouri. There are more than two hundred (200) residents currently living at SPA. The grounds consist of seventeen (17) buildings, including five (5) buildings that house twenty (20) individual town homes. There are one hundred twenty five (125) units altogether.

SPA does not believe MGE was justified in shutting off the entire complex (all 17 buildings) on October 23, 2007 for safety reasons. SPA contends that MGE over-reacted. SPA believes they were forced to buy 111 new heating units due to this shut-off. SPA is requesting that the Commission find that SPA should be reimbursed for third-party costs incurred including the 111 new heating units.

MGE contends that the shut-off of the whole complex was based on safety concerns and was a responsible reaction to the overall condition of the complex.

The crux of this complaint relates to the condition of the heating units and whether the danger apprehended by MGE was sufficient enough to justify the shut-off of gas service to the whole complex.

Critical Events

In its Answer, MGE provided a list of no less than 33 hazardous and unsafe conditions that its inspectors cited over a two year period. MGE asserts these 33 past hazardous conditions and other alleged incidents, along with the opinions of the City of Grandview

Code Inspector and Fire Chief, influenced its decision to shut down the whole complex. Even though MGE and SPA dispute the length of the list of noted hazardous conditions, and other aspects of this complaint, no single safety violation or situation led to the shut off. Rather, an accumulation of many noted hazardous situations over a period of time led to the shut off decision.

SPA believes that 33 safety violations/hazardous conditions from a total population of 125 units over a two-year period is not an excessive number of violations. SPA stated it took corrective action each time MGE notified SPA of any unsafe or hazardous conditions.

Tenants of SPA are MGE's customers of record for gas heating furnaces. SPA provides gas to cooking stoves and water heaters for all of the units. SPA is MGE's customer of record for all cooking and water heating in the living complex.

MGE asserts that it places red-tags on facilities and equipment and shuts off gas to that equipment because MGE inspectors deemed any further operation of that equipment to be unsafe.

"Red-tagging" is an act done by MGE inspectors when the inspector detects an unsafe or hazardous condition found on gas facilities and/or equipment. After the MGE inspector "red-tags" equipment, the inspector shuts off the equipment and notifies the customer to not operate the equipment until the cause of the safety violation is corrected.

SPA claims there are instances when SPA did not receive reports from the MGE inspector when MGE red-tagged" and shut off the equipment serving SPA tenants. However, MGE did provide notice of equipment safety code violations to SPA tenants, who are MGE's space heating customers of record. SPA is not the customer of record for individual tenant space heating equipment.

Over a two year period, MGE inspectors had discovered that some of the red-tagged equipment had been turned back on even though the equipment had not been repaired or the hazardous conditions eliminated.

MGE red-tagged five heating units on Monday, October 22nd for safety violations. The next day, a group of MGE employees, along with the City of Grandview's Code Inspector and Fire Chief, returned to the SPA apartments to re-inspect.

SPA solicited three bids to repair these furnaces. The first independent repairman determined all five "red-tagged" heating units needed replacement.

The second independent repairman determined one heating unit was functioning properly; three units needed repair and / or flue work, and the final heating unit needed replacement.

The third independent repairman determined that all five units needed "routine maintenance" and / or flue replacement. SPA selected this repairman.

The City of Grandview's Code Inspector told Staff that he returned to the complex on October 23rd with MGE because of the serious nature of the numerous safety code violations. In addition to the vents and the furnace operation, the Code Inspector, Fire Chief, and MGE observed inadequate openings for combustion air for the furnaces causing the combustion air to be drawn from an area where gasoline was stored. The Code Inspector said the situation was deplorable because of safety concerns to the residents, that this was not an isolated incident but an on-going problem at SPA, and this involved continuing safety violations exposing SPA residents to great risk of harm.

The Grandview Fire Chief was also contacted by MGE and the Fire Chief accompanied MGE inspectors and Code Inspector to the complex on October 23rd. The Grandview Fire Chief, the Code Inspector, and MGE agreed that the gas should be shut-off. Noting the dangerous situation, the Fire Chief determined there were sufficient and numerous life threatening safety issues to support his decision to shut off gas to the entire complex. The Fire Chief, Code Official, and MGE inspectors made a judgment call concerning the seriousness of the situation and the safety hazards exposed to the residents of the complex, and they concurred in the decision to shut down the entire complex.

MGE did not instruct SPA to purchase 111 new heating units. SPA's management made that decision after consulting with its contractors.

Staff's investigation revealed a new commercial water heater had been installed in an apartment building without properly being connected to a flue, and was therefore blowing exhaust gas directly into the apartment building. MGE claims there were other instances where red-tagged leaks in vents were fixed by "duct taping" the leaky vents - a practice generally recognized as unsafe. Any of these particular conditions could have caused death or serious injuries to the tenants of that apartment building.

This cumulative import of the numerous equipment/facility safety violations observed and noted by MGE inspectors over a 2 year time period along with the concurring opinions of the Fire Chief and Code Inspector of the danger of growing and uncorrected life-threatening hazards caused by unsafe equipment led to the disconnection of service to the entire complex.

SPA raises the issue that MGE forced them to bring its facilities up to current code standards. The City of Grandview's code inspectors required SPA to bring their equipment up to city code. MGE and the City required SPA to bring their equipment to a safe working condition.

Staff has relied on the content of MGE's tariff and the Commission Rules in making its recommendation concerning this complaint.

APPLICABLE TARIFFS & RULES

Staff applies the following tariff provisions and Commission rule to determine whether MGE acted within its authority when MGE disconnected gas service to SPA.

Staff cites tariff sheet R-36 that identifies MGE's action in the event of a dangerous condition.

4.07

DANGEROUS CONDITIONS ON CUSTOMER'S PREMISES: In any case where Company discovers that a dangerous condition exists with regard to customer's appliances, equipment or piping, it may, without advance notice, shut off the service and immediately notify customer. Service shall not be resumed until such dangerous condition has been eliminated.

Staff also cites MGE tariff sheet R-21 that identifies the suspension of service.

3.06

*SUSPENSION OF SERVICE: Company **shall have the right to suspend gas service** to customer for temporary periods as may be necessary for the inspection, maintenance, alteration, change, health, **safety**, state of emergency, **replacement or repair of gas facilities**, or for the preservation or restoration of system operations. ... **Company shall not be liable for damages occasioned by suspension of service for said causes.***
(Emphasis Added)

Staff has determined, based on the facts revealed in this case, the above cited tariff provisions apply directly to actions taken by MGE and such provisions are on-point and controlling as to the suspension of service, the central issue of this complaint. MGE tariff section 3.06 authorizes MGE to suspend gas service when MGE perceives its customers' safety to be at risk.

In addition, Staff cites tariff sheet R-34 pertaining to MGE's liability relating to the customer equipment.

3.19

COMPANY LIABILITY

"Company may refuse or discontinue service if an inspection or test reveals leakage, escape or loss of gas on customer's premises. Company will not be liable for any loss, damage or injury whatsoever caused by such leakage, escape or loss of gas from customer's service line, yard line, ancillary lines, house piping, appliances or other equipment."

"The Company does not own, nor is it responsible for the repair or maintenance of any piping, vents, or gas utilization equipment on the delivery side of the gas meter, its related appurtenances and piping. All piping, vents or gas utilization equipment furnished by the owner/customer of the premises shall be responsible for the repair and maintenance of such at all times in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company."

"The Company shall not be liable for loss, damage or injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter, which shall include but not be limited to any and all such loss, damage or injury involving piping, vents or gas utilization equipment, whether inspected or not by the Company, or occasioned by interruption, failure to commerce delivery, or failure of service or delay in commencing service due to accident to or breakdown of plant, lines, or equipment, strikes, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or without limitation by the preceding enumeration, any other act or things due to causes beyond Company's control, or attributable to the negligence of the Company, its employees, contractors or agents."

Commission Rule 4 CSR 240-40.030(12)(S)(3)

MGE's actions and ultimate decision to disconnect gas service due to dangerous situations complies with Commission Rule 4 CSR 240-40.030(12)(S)(3) which states:

3. The operator shall discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe. The operator, however, may continue providing service to the customer if the unsafe conditions are removed or effectively eliminated.

The mere appearance of unsafe facilities requires MGE to discontinue service. Based on the facts presented, MGE met this threshold. Therefore, MGE's disconnection of the whole complex was justified and in compliance with this Commission rule.

Staff disagrees with both MGE's and SPA's argument on a requirement to perform a "visual inspection" of each and every customer line and equipment as a prelude to conducting a shut-off. There is no absolute "testing requirement of inside piping" as a prerequisite to performing a disconnection. Both MGE and SPA improperly cite various Connection Rules (not a Disconnection Rule) to reach their conclusions.

Commission Rule 4 CSR 240-40.030(12)(S)(3) is the sole controlling requirement.

DISCUSSION of WHAT CONSTITUTES SAFE vs. UNSAFE

MGE must disconnect service when the Company believes a dangerous situation is present. MGE did not take lightly its decision to shut off gas to the complex. MGE took the additional step of calling in the City of Grandview Fire Chief and Code Inspector to accompany MGE's inspectors. Staff's investigation included comments of the city Fire Chief, code officials, and a contractor. The Staff had conversations with Nick Workman, the supervisor of Scott Carr who was the city code inspector present at SPA. Mr. Workman had conferred with Mr. Carr and concurred in the decision to shut off the gas. Mr. Carr informed Mr. Workman the "*situation was deplorable*" and that "*he did not have a problem if it was turned off*". Staff also had a conversation with Chuck Thacker, the Grandview Fire Chief who stated he "*...believed there were life and safety issues and that was all he needed to make his decision... and he thought the gas should be shut-off.*"

According to SPA, its contractor, AirStar inspected all of the furnaces. AirStar made the recommendation to SPA it would be cost effective to replace the 111 units in question. AirStar stated the sheer age of the equipment and the time it would take them to remove the heat exchangers and thoroughly clean them would cost a great deal of money.

These third party assessments support MGE's assessment regarding the dangerous situation at the SPA complex.

MGE DID NOT "FORCE" SPA TO BUY FURNACES

MGE did not force SPA's management to purchase 111 new furnace units. SPA's owner made that decision. The Grandview City Code Inspector Mr. Workman concurred when he stated: "*The owner had options other than replacing the furnaces. He did not have to replace them.*"

In addition, the placement of a red-tag on an appliance by MGE does not mean a customer has to replace that appliance. It only indicates the appliance is not operating safely and needs to be repaired or the hazardous condition corrected to meet safe operating standards.

RELIEF SOUGHT BY COMPLAINANT

SPA has requested in its prayer for relief:

- 1) Re-imbursement of replacement costs for 111 furnaces;
- 2) Re-imbursement of labor costs re: inspection and replacement of same;
- 3) Re-imbursement of expenses associated with financing of furnace replacements;
- 4) Loss of future income from departure of tenants who moved due to gas being shut off; and,
- 5) Attorney fees.

On advice of counsel, the Commission has no authority to award Complainant such costs, fees, or damages even if the Commission were to decide this complaint in its favor.

STAFF'S RECOMMENDATION

As a result of its investigation and the foregoing reasons, Staff believes MGE acted reasonably and in the best interest of the ultimate safety of its customers. Therefore, the Staff recommends the Commission find MGE did not violate any tariff or Commission Rules regarding MGE actions taken in the course of events that generated this complaint, and dismiss this complaint.

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Complainant,

v.

Missouri Gas Energy,

Respondent

Case No. GC-2008-0228

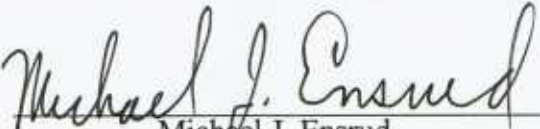
AFFIDAVIT OF MICHAEL J. ENSRUD

STATE OF MISSOURI

COUNTY OF COLE

)
) ss
)

Michael J. Ensrud, of lawful age, on oath states: that he has participated in the preparation of the foregoing written memorandum, to be presented in the above case; that the information in the attached written report was given by Missouri Gas Energy (MGE) and FP Grandboro, LLC, Complainant; that he has knowledge of the matters set forth in such memorandum; and that such matters are true to the best of his knowledge and belief.


Michael J. Ensrud

Subscribed and sworn to before me this 14th day of March, 2008.



SUSAN L. SUNDERMEYER
My Commission Expires
September 21, 2010
Callaway County
Commission #06942086


Notary Public

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FP Grandboro, LLC,

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v.

Missouri Gas Energy,

Respondent

Case No. GC-2008-0228

AFFIDAVIT OF ROBERT R. LEONBERGER

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

Robert R. Leonberger, of lawful age, on oath states: that he has participated in the preparation of the foregoing written memorandum, to be presented in the above case; that the information in the attached written report was given by Missouri Gas Energy (MGE) and FP Grandboro, LLC, Complainant; that he has knowledge of the matters set forth in such memorandum; and that such matters are true to the best of his knowledge and belief.


Robert R. Leonberger

Subscribed and sworn to before me this 14th day of March, 2008.



SUSAN L. SUNDERMEYER
My Commission Expires
September 21, 2010
Callaway County
Commission #06942086


Notary Public