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December 4, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

FILED

DEC 04 2003

RE: *Michael E. McKinzy, Sr. v. Missouri Gas Energy*
Case No. GC-2003-0579

**Missouri Public
Service Commission**

Dear Mr. Roberts:

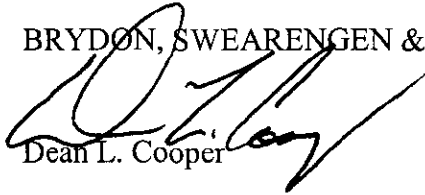
Enclosed for filing on behalf of Missouri Gas Energy in the above-referenced matter are the original and eight (8) copies of each of the following documents:

- Motion for Summary Determination or, in the Alternative, for Dismissal of Complaint; and,
- Suggestions in Support of Motion for Summary Determination or, in the Alternative, for Dismissal of Complaint.

A copy of the foregoing documents has been hand-delivered or mailed this date to each party of record.

Thank you for your attention to this matter.

Sincerely,

By: 
BRYDON, SWEARENGEN & ENGLAND P.C.
Dean L. Cooper

DLC/jar
Enclosures
cc: Michael E. McKinzy, Sr.
Bob Berlin
Doug Micheel

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

DEC 04 2003

Missouri Public
Service Commission

Michael E. McKinzy, Sr.,)
)
Complainant,)
)
v.)
)
Missouri Gas Energy,)
)
Respondent.)

Case No. GC-2003-0579

SUGGESTIONS IN SUPPORT OF
MOTION FOR SUMMARY DETERMINATION OR, IN THE ALTERNATIVE,
FOR DISMISSAL OF COMPLAINT

COMES NOW Missouri Gas Energy, a division of Southern Union Company ("MGE"),
by and through its counsel, and, pursuant to 4 CSR 240-2.117, submits its Suggestions In
Support of its Motion for Summary Determination, etc., filed simultaneously herewith.

1. Standard for Summary Determination

4 CSR 240-2.117 provides that:

The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

See 4 CSR 240-2.117(E).

Similarly, Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure states that summary judgment shall be entered if the motion and response thereto reveal that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

See Stanley v. City of Independence, 995 S.W.2d 485, 486 (Mo. banc 1999). However, the key

to a grant of summary judgment is the movant's undisputed right to judgment as a matter of law, not simply the absence of any factual issue. *State ex rel. Nixon v. Boone*, 927 S.W.2d 892, 895 (Mo. App. W.D. 1996).

2. Tariff Provisions Are Controlling

Regarding its initial refusal to commence service to Complainant's residence at 8004 Overton Drive, Raytown, Missouri, ("subject residence") MGE believes that, in view of Ms. Nance's name being provided with the application for service, it acted in accordance with the language of its tariffs and that payment of past due charges owed by residents of the subject residence could be required before gas service was provided to that address. (See Section 3.12 on Sheets Nos. R-30 and R-31 of MGE's General Terms and Conditions for Gas Service (The Company may require that 100% of the outstanding balance be paid before service is reconnected.)) (Exhibit A). Further, Section 3.02 (Sheet Nos. R-19 and R-20) clearly supported MGE's refusal to commence service to the subject residence under the information then apparent to MGE, suggesting that Ms. Nance was in fact a co-lessee of the property and/or was residing there. Section 3.02 states in relevant part that:

Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made.

See Exhibit B.

On this point, the Staff appears to confuse the tariff requirements for discontinuing service, as opposed to refusing to commence service. In its Staff Report of Investigation and Recommendation, ("Staff Report") Staff argues that MGE was misapplying Section 3.02 to deny

commencement of service to the residence leased by Complainant, when he had received no “use and benefit” of the service provided to Ms. Nance at her separate residence, from which accrued the past due debt at issue. *See* Staff Report, pp. 4-5. However, the “use and benefit” analysis is wholly inapplicable to the use of Section 3.02 to deny the commencement of service. Rather, it is only when MGE proposes to discontinue existing service that any review of use and benefit must be made. Section 3.02, Sheet No. R-23, clearly provides that MGE shall not “discontinue” service based upon “the failure to pay the bill of another customer unless the customer whose service is sought to be discontinued received *substantial benefit and use of the service.*” *See Exhibit B.* MGE never proposed discontinuing service to the subject residence. Under the unambiguous provision of MGE’s lawful and approved tariff, at Section 3.02, Sheet No. R-19 (quoted above), MGE was authorized, if it believed Ms. Nance was residing at the subject residence, to refuse commencement of service until such time as her past debt was paid. This is because under those facts, Ms. Nance would have been a “member of applicant’s household (who has received benefit from previous gas service). . .” and thus squarely within the intent of Section 3.02. Of course, it is well settled that

“[a] tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.”

Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568, 570 (Mo. App. E.D. 1997).

Therefore, even under the scenario envisioned by the Commission, in which evidence later reveals that Ms. Nance is residing at the subject residence and that she has still not paid her past due debt from her prior residence, there would be no issue remaining to be litigated in this matter. At that point the tariff provisions would by necessity come into play and would direct

MGE's options.¹

Thus, MGE's tariff provisions are unambiguous and controlling of the possible scenario addressed by the Commission in its November 5 Scheduling Order. There is nothing left for the Commission's determination on this issue, and MGE is clearly entitled to summary determination in its favor.

3. Dismissal of Complaint

As set forth in its Response to Staff Report of Investigation and Recommendation; Satisfaction of Complaint, filed with the Commission on September 12, 2003, MGE believes that it satisfied all cognizable issues in the Complaint by commencing service to the subject residence and by declining to place Ms. Nance's past due debt on Complainant's new account. MGE asserts that these actions, taken after learning that Ms. Nance was not on the lease and not having further evidence establishing her presence at the subject residence, absolutely moot any relief which Complainant may be seeking in this action. More significantly, MGE asserts that any action by the Commission at this time, based only on "possible" scenarios involving the review of hypothetical applications of the Company's tariffs, would be in the nature of judicial declaratory relief and thus unauthorized under Missouri law².

¹Because service to the subject residence and to Complainant has already commenced, MGE concedes that it would not be authorized to discontinue service pursuant to its tariff, because Complainant had not received the substantial benefit and use of the service supplied to Ms. Nance's prior residence. Rather, MGE would be limited to either refusing commencement of service to any new residence the couple might move into together, or, possibly, utilizing the tariff provision found on Sheet No. R-20 and transferring the previous debt to the new account established for the subject residence. Such a transfer is clearly authorized by the provision set forth on Sheet No. R-20.

²At page 3 of its Order Scheduling Prehearing Conference, issued November 5, 2003, the Commission notes the implication in MGE's response to the Staff Report "that if MGE obtains

Section 527.010, RSMo. 2000, states that:

The *circuit courts* of this state, within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.

(Emphasis added). The Commission would be attempting to declare the rights or status of MGE with regard to issues not even presented by the facts of this Complaint, if it were to engage in a speculative determination of MGE's authority in the event Ms. Nance moved into the subject residence at some point in the future. And, there is at this time no "further relief" which "could be claimed" by the Complainant, as discussed above.

Mo. Const. Art. V, Sec. 1 states that "[t]he judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." Not even the state legislature can "turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary." *State Tax Comm'n. v. Administrative Hearing Commission*, 641 S.W.2d 69, 76 (Mo. banc 1982). Certainly, then, the Commission cannot assume this role for itself by issuing what would amount to a declaratory judgment in this case. Additionally, the Commission, as an administrative agency, may exercise only those powers conferred on it by statute, and the Commission's statutes contain no provision authorizing it to issue what amounts to declaratory relief. *See Barber v. Jackson County Ethics Comm'n.*, 935 S.W.2d 62, 67 (Mo. App. W.D. 1996). Of course, any such authority would be

evidence that [Complainant's] wife, Ms. Nance, is living at 8004 Overton Road, MGE may transfer Ms. Nance's past-due debt to the account for 8004. Overton Road. It seems, therefore, that [Complainant's] complaint has not been resolved." Obviously the Commission had no evidence before it that Ms. Nance was residing at 8004 Overton Road at the time it issued its order. To the contrary, the Staff Investigation and Report ordered by the Commission made it very clear that Staff had found no evidence to suggest that Ms. Nance was residing at that address." *See Staff Report*, pp. 3-4.

invalid in any case under the Supreme Court's application of Art. V Sec. 1 in the *State Tax Comm'n.* opinion³.

In view of the above, the Commission must, if it does not find MGE entitled to summary judgment in its favor, dismiss this Complaint on the grounds that the Commission has no constitutional authority or jurisdiction to engage in review of the concerns set forth in its November 5 Scheduling Order, as such review would necessarily be judicial in nature.

WHEREFORE, Respondent, Missouri Gas Energy, for all of the reasons set forth above and in its Motion for Summary Determination, etc. filed concurrently herewith, respectfully requests that this Commission enter an Order finding for MGE on all remaining issues, in that there are no genuine issues of material fact and MGE is entitled to determination as a matter of law; or, in the alternative, MGE requests that this Commission dismiss the Complaint herein on the basis that Complainant has received from MGE the relief he requests, and that in view thereof any further relief granted by this Commission would be in the nature of judicial

³See also *Lederer v. State Dept. of Social Services*, 825 S.W.2d 858, 863 (Mo. App. W.D. 1996), which holds that administrative bodies, even those such as the Administrative Hearing Commission which are vested with broad fact-finding functions, "cannot be a court in the constitutional sense" and cannot be given powers which the constitution reserves to the judiciary. To do so would violate the constitutional principle of separation of powers. *Id.*

declaratory relief and thus unauthorized by the Constitution of the State of Missouri.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI GAS ENERGY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered or sent by U.S. Mail, postage prepaid, on December 4, 2003, to the following:

Office of the General Counsel
Governor Office Building
Jefferson City, MO 65101

Office of the Public Counsel
Governor Office Building
Jefferson City, MO 65101

Michael E. McKinzy, Sr.
8004 Overton Drive
Raytown, Missouri 64138

