

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 9<sup>th</sup> day of November, 2011.

|                                       |   |                       |
|---------------------------------------|---|-----------------------|
| The Staff of the                      | ) |                       |
| Missouri Public Service Commission,   | ) |                       |
|                                       | ) |                       |
| Complainant,                          | ) |                       |
|                                       | ) |                       |
| vs.                                   | ) | File No. GC-2011-0100 |
|                                       | ) |                       |
| Southern Union Company,[ <sup>1</sup> | ) |                       |
|                                       | ) |                       |
| Respondent.                           | ) |                       |

**FINAL DECISION  
AND ORDER TO FILE A NEW TARIFF SHEET**

Issue Date: November 9, 2011

Effective Date: November 19, 2011

The Missouri Public Service Commission is denying dismissal and ruling on the complaint's merits as follows.

- Sheet R-34 violates no regulation—promulgated or unpromulgated—and is not unjust or unreasonable under contract law.
- But Sheet R-34 nevertheless contains terms of service that are facially unjust and unreasonable as to Company immunity for negligence related to gas leaks, immunity for any conduct beyond ordinary negligence in general, and customer indemnity.

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<sup>1</sup> The complaint names respondent as "Missouri Gas Energy, a Division of Southern Union Company," but an unincorporated division of a corporation is not a legal entity, and, therefore, lacks legal capacity to sue or be sued. *ADP Dealer Services Group v. Carroll Motor Co.*, 195 S.W.3d 1, 7 (Mo. App. E.D., 2005). Nevertheless, the Company received notice, made its appearance and filed its answer. Therefore, the Commission corrects the misnomer sua sponte.

This order constitutes the Commission’s final decision subject to rehearing under Section 386.500, RSMo 2000.<sup>2</sup>

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<sup>2</sup> 4 CSR 240.2-070(13).

## Background

Staff filed the complaint on October 7, 2010, against Southern Union Company (“the Company”).<sup>3</sup> The complaint vests the parties with the right to a pre-decision<sup>4</sup> evidentiary<sup>5</sup> hearing. Therefore, this action is a contested case.<sup>6</sup>

The Company filed the motion to dismiss on November 29, 2010, and Staff filed a response on December 1, 2010.

Staff filed its *Motion for Summary Determination* (“Staff’s motion”) with an affidavit and suggestions on December 12, 2010. On April 11, 2011, the Company filed its response to Staff’s motion with an affidavit and memorandum. On May 18, 2011, Staff filed reply suggestions in support of Staff’s motion.

The Company filed *Missouri Gas Energy’s Motion for Summary Determination* (“utility’s motion”), with a memorandum, on April 11, 2011. On May 18, 2011, Staff filed its response to the Company’s motion with suggestions. On June 16, the Company filed reply suggestions in support of the Company’s motion. The Office of the Public Counsel (“OPC”) filed suggestions in support of Staff’s motion on June 2, 2011 and the Company filed a response on July 29, 2011. On that date, the motion to dismiss and motions for summary determination were ready for ruling.

The Commission makes each ruling on consideration of all allegations and arguments of each party, and the substantial and competent evidence upon the whole record, but the Commission does not specifically address matters that are not dispositive.

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<sup>3</sup> This file was re-assigned to the current regulatory law judge on July 14, 2011.

<sup>4</sup> Section 386.390.5, RSMo 2000.

<sup>5</sup> *Jamison v. Dept. of Soc. Servs.*, 218 S. W. 3d 399, 408-09 (Mo. banc 2007); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>6</sup> Section 536.010(4), RSMo Supp. 2010; and Section 536.063(1), RSMo 2000.

### **Evidentiary Rulings**

Staff and the Company support their respective motions with affidavits as provided by regulation.<sup>7</sup> Also, for additional support Staff and the Company each ask the Commission to take official notice of the Commission's records.<sup>8</sup> The Commission grants those requests.<sup>9</sup> This order constitutes notice that the Commission takes official notice of scientific and technical facts within the Commission's competence under Section 536.070(6), RSMo 2000.

### **Charges**

In the complaint, Staff alleges that a page ("Sheet R-34") in the Company's tariff sets forth provisions that are contrary to law and public policy. In the motion to dismiss, the Company argues that the complaint is not within the Commission's authority to hear. In the motions for summary determination, each party argues that earlier Commission decisions or regulations support its claim or defense.

### **Findings of Fact**

1. The Company is a Delaware general business corporation in good standing, headquartered at 5444 Westheimer Road, Houston, Texas 77056. The Company is registered as a foreign corporation doing business in Missouri and does business under the registered fictitious name Missouri Gas Energy. The Company's Missouri headquarters is at 3420 Broadway, Kansas City, Missouri 64111.

2. The Company distributes natural gas at retail in Missouri for light, heat and power, using gas plant that it owns or operates, under tariffs approved by the Commission. The Company engages in no other business in Missouri. The Company

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<sup>7</sup> 4 CSR 240-2.117(1)(C).

<sup>8</sup> Section 536.070(6), RSMo 2000.

<sup>9</sup> Section 536.070(5) and (6), RSMo 2000.

has approximately 501,000 residential, commercial and industrial customers in 34 Missouri counties.

3. Natural gas is noxious and highly combustible, necessitating high levels of safety precautions in delivery and use. To provide service, some Company property may have to be on customer premises. The Company is seldom on any customer's premises except to turn on service and respond to service calls. The customer's side of the meter is also called the delivery side of the meter.

4. On May 1, 2006, the Company filed tariffs<sup>10</sup> that the Commission later rejected.<sup>11</sup> On March 28, 2007, the Company filed new tariff sheets. Those new tariff sheets included The Company's tariff P.S.C. MO. No. 1, Fourth Revised Sheet R-34, ("Sheet R-34"), which the Commission approved by order dated April 3, 2007 ("tariff order").<sup>12</sup> Sheet R-34 limits the Company's liability to the Company's customers, as set forth at length in this order's Appendix. By order dated May 3, 2007, the Commission denied all applications for rehearing.

5. Effective on January 23, 2010, Commission rejected four tariff pages filed by Laclede Gas Company ("Laclede decision").<sup>13</sup> The pages rejected in the Laclede decision included a tariff sheet limiting Laclede's liability to its customers. By order dated July 21, 2010, the Commission denied Laclede's application for rehearing.

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<sup>10</sup> *In the Matter of Missouri Gas Energy's Tariffs Increasing Rates for Gas Service Provided to Customers in the Company's Missouri Service Area*, File No. GR-2006-0422.

<sup>11</sup> *Id.*, Report and Order, issued on January 13, 2010.

<sup>12</sup> *Id.*, Order Regarding Motion for Expedited Consideration and Approval of Tariff Sheets in Compliance with Commission Order, issued and effective on April 3, 2007.

<sup>13</sup> *In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment*, File No. GT-2009-0056, Report and Order, issued on January 13, 2010.

## Conclusions of Law

The Commission has jurisdiction to hear a complaint against any public utility.<sup>14</sup> A public utility includes a gas corporation,<sup>15</sup> which means an entity operating a gas plant under the Commission's authority.<sup>16</sup> That includes the Company.

The Commission addresses the motion to dismiss and the motions for summary determination ("pending motions") together because the pending motions involve overlapping arguments, authorities, and allegations. The pending motions share the same methods of proof where the motion to dismiss cites matters outside the pleadings. But dismissal and summary determination are not synonymous. Each addresses different issues and has different results.<sup>17</sup>

The motion to dismiss challenges whether the relief sought is within the subject matter jurisdiction<sup>18</sup> of the Commission. The Company, as movant, has the burden of showing that the Commission lacks subject matter jurisdiction to hear the complaint.<sup>19</sup> When an agency lacks jurisdiction, it can only exercise its inherent power to dismiss matters outside its authority.<sup>20</sup>

Summary determination always addresses the merits of a claim or defense.<sup>21</sup> The regulation provides that the Commission may grant either motion for summary determination:

. . . if the **pleadings, testimony, discovery, affidavits, and memoranda** on file show that there is no genuine issue as

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<sup>14</sup> Section 386.390.1, RSMo 2000.

<sup>15</sup> Section 386.020(43), RSMo Supp. 2010.

<sup>16</sup> Section 386.020(18), RSMo Supp. 2010.

<sup>17</sup> *State ex rel. City of Blue Springs, Missouri v. Schieber*, 343 S.W.3d 686, 690 (Mo. App., W.D. 2011).

<sup>18</sup> Missouri recognizes two types of jurisdiction: personal jurisdiction, which is not at issue, and subject matter jurisdiction, which is the authority to order relief. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252-54 (Mo. banc 2009).

<sup>19</sup> *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003) (citations omitted).

<sup>20</sup> *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000) (citations omitted).

<sup>21</sup> *State ex rel. City of Blue Springs, Missouri v. Schieber*, 343 S.W.3d 686, 690 (Mo. App., W.D. 2011).

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 [<sup>22</sup>]

Entitlement to relief as a matter of law depends on the burden of proof and movant's posture as claimant party or defending party.<sup>23</sup>

The Company argues that Sheet R-34 is presumed lawful and reasonable under Section 386.270, RSMo 2000:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Also, Section 386.430 provides:

In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence [<sup>24</sup>] that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

Those provisions place the burden of proof on Staff, which determines what entitles either party to a favorable decision as follows.

Therefore, on summary determination, the standard for each party is as follows. Staff prevails by establishing, without genuine dispute, the material facts on which Staff would bear the burden of proof at hearing—the elements of Staff's claim. The Company

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<sup>22</sup> 4 CSR 240-2.117(1)(E) (emphasis added).

<sup>23</sup> *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, which is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

<sup>24</sup> That standard, also found in equity and in contract law, connotes something less than proof beyond reasonable doubt. *McBride v. Mercantile-Commerce Bank & Trust Co.*, 48 S.W.2d 922, 927-28 (Mo. banc 1932).

prevails by establishing, without genuine dispute, facts that accomplish any one of three goals. Those goals are: (1) negate any single element of Staff's claim, or (2) show that Staff will be unable to prove any element of Staff's claim even after discovery, or (3) establish the materials facts—the elements—of an affirmative defense.<sup>25</sup> Each party must also show that granting its motion is in the public interest.<sup>26</sup> The public interest includes factors related to “efficient facilities and substantial justice between patrons and public utilities [. <sup>27</sup>]”

Staff and the Company seek summary determination, and OPC supports Staff's motion, so each of those parties has assented to a decision on the merits without a hearing. As Staff puts it, “the Commission may grant summary determination for any party once its authority under the rule [on summary determination] is invoked.”<sup>28</sup> Staff is correct and the Commission will enter summary determination for any party as the law and undisputed facts require.

## I. Jurisdiction

The Company addresses the threshold issue of whether the Commission can hear the complaint. Because the Commission is a creation of the statutes, the statutes are the source of the Commission's jurisdiction.<sup>29</sup> Therefore, the Commission must find its authority in the words of the statutes.

The statutes provide that the Commission may order the Company to file tariffs setting forth terms of service:

The commission shall:

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<sup>25</sup> *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993).

<sup>26</sup> 4 CSR 240-2.117(1)(E).

<sup>27</sup> Section 386.610, RSMo 2000.

<sup>28</sup> *Staff's Suggestions in Opposition to MGE's Motion for Summary Determination and Staff's Reply to MGE's response to Staff's Motion for Summary Determination*, page 2, footnote 2.

<sup>29</sup> *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 331 S.W.3d 677, 682 (Mo. App., W.D. 2011).



\* \* \*

(11) Have power to require every gas corporation . . . to file with the commission . . . schedules showing . . . all rules and regulations relating to . . . service used or to be used . . . by such gas corporation [<sup>30</sup>]

Such schedules are changeable under “a new or supplementary schedule, filed voluntarily, or by order of the commission.”<sup>31</sup> The Commission may initiate such change because the Commission’s “supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.”<sup>32</sup>

The parties dispute how and when such orders and directives may come about.

#### A. Complaint for Just and Reasonable Terms of Service

In the complaint, Staff cites Section 393.140(5), which expressly allows a complaint relating to an existing tariff, and a Commission decision prescribing just and reasonable terms for the Company’s service:

Whenever **the commission** shall be of the opinion, after a hearing had **upon its own motion or upon complaint**, that the rates or charges or the **acts or regulations** of any such persons or corporations are **unjust, unreasonable**, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall **determine and prescribe** the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and **the just and reasonable acts and regulations to be done and observed** [<sup>33</sup>]

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<sup>30</sup> Section 393.140, RSMo 2000.

<sup>31</sup> *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm’n of Missouri*, 315 Mo. 312, 317, 286 S.W. 84, 86 (Mo.1926).

<sup>32</sup> *State ex rel. Chicago, R. I. & P. R. Co. v. Public Serv. Comm’n*, 312 S.W.2d 791, 796 (Mo. banc 1958).

<sup>33</sup> Section 393.140(5), RSMo 2000.

Under that statute, the Commission may prescribe just and reasonable terms of service when the Commission finds that existing terms of service are unjust and unreasonable, as the complaint charges. Staff is correct that the authority granted in Section 393.140(5) and (11) prevails against each argument of the Company, and require the Commission to deny dismissal, as follows.

### B. The Company's Challenges

The Company argues that the Commission cannot hear the complaint on several procedural grounds.

The Company's affirmative defenses include estoppel and, in support of that remedy, cite the *Staff Recommendation* supporting the tariff order.<sup>34</sup> The Company neither specifies the type of estoppel sought, nor pleads facts under which the State is subject to any species of estoppel,<sup>35</sup> nor offers authority under which the Commission can enforce equitable principles on any facts.<sup>36</sup> The estoppel theory never appears again in the file: neither in the *Motion to Dismiss*, nor the Company's motion for summary determination, nor in any of the Company's filings related to Staff's motion. Therefore, the Commission will grant Staff's motion and deny the Company's motion for summary judgment on that basis.

The remaining grounds are as follows.

#### *(i) Ripeness*

The Company argues that the Commission has no authority to decide whether Sheet R-34 is just and reasonable, until the Commission receives an allegation that an event that Sheet R-34 describes has occurred.

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<sup>34</sup> *First Amended Answer by Interlineation*, pages 1-2, paragraph 3.

<sup>35</sup> *Prince v. Division of Family Servs.*, 886 S.W.2d 68, 73 (Mo. App., W.D. 1994).

<sup>36</sup> *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 352 (1951).

The statutes expressly provide that damages are not an element of this action:

The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.<sup>37</sup>

Nevertheless, the Company cites several authorities in support of its theory.

The Company cites the ripeness doctrine and argues that the complaint alleges no case or controversy. No case or controversy clause exists in the Missouri constitution, and the Company cites no authority applying the ripeness doctrine to any tribunal other than those of the judicial branch. As the Company's authorities show, the ripeness doctrine protects agency decision-making from premature intervention by the judiciary, not the agency itself.<sup>38</sup> The Commission has no authority to determine Section 393.140(5)'s validity under any constitution.

The Company argues that the complaint must allege conduct by the Company. In support, the Company cites Section 386.390.1, RSMo 2000:

Complaint may be made by the commission of its own motion, . . . in writing, setting forth any act or thing done or omitted to be done by any . . . public utility, . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission [.]

The Company further cites case law holding that the Commission cannot issue an advisory opinion.<sup>39</sup>

But no advisory opinion is at issue. The complaint alleges that the Company is operating under a tariff setting forth unjust and unreasonable terms of service, The complaint seeks a tariff setting forth just and reasonable terms of service. Also, the facts alleged are the text of Sheet R-34. Those allegations are established, in both parties'

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<sup>37</sup> Section 386.390.3, RSMo 2000.

<sup>38</sup> *Missouri Soybean Assoc. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 26 (Mo. banc 2003).

<sup>39</sup> *State ex rel Kansas City Power & Light Co.*, 770 S.W.2d 740, 743 (Mo. App., W. D. 1989).

filings, by evidence consisting of the approved Sheet R-34 on file with the Commission. On such pleading and evidence, an order granting relief does not constitute an advisory opinion. Therefore, the Commission will rule against the Company as to that theory.

*(ii) Suit and Collateral Action*

The Company cites Section 386.270, RSMo 2000, which allows a challenge to the tariff order as follows:

[A]ll regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable **until found otherwise in a suit** brought for that purpose pursuant to the provisions of this chapter [386, RSMo.]

A suit, as used in Chapter 386, is an action in circuit court. Section 386.600 refers to a “suit to review such order” of the Commission—that is, judicial review. Case law also supports the conclusion that Section 386.270 refers to judicial review.<sup>40</sup> The Company offers no example of an original action in any court to test the Commission’s decisions.

The Company also cites Section 386.550, RSMo 2000, which bars a collateral attack on the tariff order as follows:

In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

Under that provision, the tariff order is conclusive in any collateral action. A collateral action is an action attempted in lieu of an exclusive remedy.<sup>41</sup> The Company also argues that the complaint constitutes an untimely motion for rehearing of the tariff order.

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<sup>40</sup> State ex rel. GTE North, Inc. v. Missouri Public Service Comm’n, 835 S.W.2d 356, 367-68 (Mo. App., W.D. 1992).

<sup>41</sup> State v. Kosovitz, 342 S.W.2d 828, 830 (Mo.1961).

But contesting the tariff order is not the sole means for determining just and reasonable terms of service under any authority cited. On the contrary, Staff cites the plain language of Section 386.490.2, S.B. 48, 96<sup>th</sup> Gen. Assem., 1<sup>st</sup> Reg. Sess.:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or **until changed or abrogated by the commission** [.]

(Emphasis added.) To have the tariff order “changed or abrogated” is the relief sought in the complaint, an original and direct action, under Section 386.140(5).

The Company’s arguments render Sections 386.490.2 and 386.140(5) meaningless, and the law presumes against that reading.<sup>42</sup> By contrast, when read in harmony, as Staff suggests, and as befits provisions *in pari materia*,<sup>43</sup> there is no conflict between tariff procedure and complaint procedure. Neither suggests exclusivity, neither demands exhaustion before filing the other,<sup>44</sup> and neither attempts to bypass the Commission.<sup>45</sup> In the absence of any clear requirement to choose between a tariff action and a complaint action, the Commission concludes that those procedures are alternatives.

Therefore, the Commission will rule against the Company as to that theory.

*(iii) Standing*

The Company argues that Staff has no standing to file the complaint. Commission regulation 1 CSR 240-2.070 provides:

The commission on its own motion, the **commission staff** through the general counsel, the office of the public counsel,

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<sup>42</sup> *Hyde v. City of Columbia*, 637 S.W.2d 251, 262-3 (Mo. App., W.D. 1982).

<sup>43</sup> 835 S.W.2d at 367-68.

<sup>44</sup> *Homestake Lead Co. of Missouri v. Director of Revenue*, 759 S.W.2d 847 (Mo. banc 1988)

<sup>45</sup> *Director of Revenue v. Westinghouse Credit Corp.*, 787 S.W.2d 715, 718 (Mo. banc 1990).

or any person or public utility who feels aggrieved by a violation of any statute, rule, order, or decision within the commission's jurisdiction **may file a complaint.** [<sup>46</sup>]

In that regulation, the Commission delegates<sup>47</sup> its own standing<sup>48</sup> to Staff. Therefore, the Commission will rule against the Company as to that theory.

### C. Other Alternative Actions

As Staff notes, even if the Commission could not hear the complaint and even if Staff could not file the complaint, the statutes expressly provide that the Commission can address the subject matter of the complaint. On its own motion the Commission may initiate either a:

- Hearing on whether the Company's terms of service are unjust or unreasonable;<sup>49</sup> or
- Complaint as to the reasonableness of the Company's charges for service,<sup>50</sup> in which all costs of operation are relevant.<sup>51</sup>

Administrative economy favors maintaining Staff's complaint, compared to dismissing the complaint and initiating an identical action on the Commission's motion, so the Commission will deny dismissal on that basis also.

## **II. Merits**

Staff and the Company make the following arguments as to the complaint's merits.

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<sup>46</sup> 4 CSR 240-2.070(1) (emphasis added).

<sup>47</sup> Under Section 386.240, RSMo 2000.

<sup>48</sup> Under Sections 386.390.1 and 386.140(5).

<sup>49</sup> Section 386.140(5).

<sup>50</sup> Section 393.390.1.

<sup>51</sup> *State ex rel. Office of Public Counsel v. Public Service Comm'n of Missouri*, 858 S.W.2d 806, 812 (Mo. App. W.D. 1993).

## A. Contract

In Staff's motion for summary determination, but not in the complaint, Staff argues that Sheet R-34 Paragraphs 1, 2, 4, and 5, which immunize the Company from ordinary negligence against its customers, are unconscionable under contract law.

Courts refuse to enforce a contract if they find it unconscionable as to procedure and substance.<sup>52</sup> Staff does not cite contract law in the complaint, and concedes that contract law does not apply to a tariff, but Staff nevertheless discusses unconscionability at length. Therefore, the Commission will address that argument.

Procedural unconscionability relates to the formalities of making an agreement like fine print, high pressure sales tactics, and unequal bargaining positions.<sup>53</sup> The General Assembly has determined that customers take no direct part in such formalities in a tariff action; a tariff is enforceable by filing and Commission approval or inaction alone,<sup>54</sup> and customer participation occurs through the Public Counsel's representation.<sup>55</sup> Therefore, the Commission concludes that Sheet R-34 is not subject to doctrines of contractual procedural unconscionability.

Substantive unconscionability relates to the harshness and unfairness of contract terms.<sup>56</sup> But contractual immunity from ordinary negligence is not necessarily unconscionable.<sup>57</sup> The Commission concludes that Sheet R-34 is not subject to doctrines of contractual substantive unconscionability.

The Commission will deny Staff's motion and grant summary determination for the Company on that theory.

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<sup>52</sup> *Manfredi v. Blue Cross and Blue Shield of Kansas City*, 340 S.W.3d 126, 132 (Mo. App. W.D. 2011).

<sup>53</sup> *Id.*

<sup>54</sup> Section 393.150, RSMo 2000.

<sup>55</sup> Section 386.710.1(2), RSMo 2000.

<sup>56</sup> 340 S.W.3d at 132.

<sup>57</sup> *Frank v. Mathews*, 136 S.W.3d 196, 199-200 (Mo. App., W.D. 2004).

## B. Published Regulations

In Complaint Paragraph 10, Staff charges that Sheet R-34, paragraph 3 violates certain provisions of Commission regulations. Commission regulations “prescribe the form of every” tariff under the statutes:

The Commission shall have power:

\* \* \*

(11) . . . The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time. [<sup>58</sup>]

Those regulations are at 4 CSR 240-3.260 and Staff cites no such regulation in the complaint. In the complaint, the Commission cites regulation 4 CSR 240-40.030(10)(J) and (12)(S), set out fully in Appendix 2, but those provisions do not say anything about any tariff, so no tariff can violate those provisions.<sup>59</sup>

Regulations 4 CSR 240-40.030(10)(J) and (12)(S) require the Company to visually inspect fuel lines, test fuel lines, comply with local codes, keep records of those activities, cut off unsafe service, and give information to customers. No relief from those duties appears in Sheet R-34 because Sheet R-34 sets forth no waiver of any duty as allowed under 4 CSR 240-40.030(17).

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<sup>58</sup> Section 393.140, RSMo 2000.

<sup>59</sup> Even if there were a conflict between the regulation and the tariff, the tariff has the status of a statute, as Staff notes. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App., W.D.2006) (citation omitted). Staff cites no instance in which a regulation controls over a statute. *Fehrman v. Blunt*, 825 S.W.2d 658, 660 (Mo. App., E.D. 1992).



*(i) Customer Information and Duty to Warn*

In Complaint Paragraph 10(a), Staff cites Company's duty as to customer information and argues that Sheet R-34 relieves the Company of a "duty to warn of potential hazards" under 4 CSR 240-40.030(12)(S). That regulation requires the Company to communicate with the customer as follows.

2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

A. Information on how to contact the operator in the event of an emergency or to report a gas odor;

B. Information on how and when to contact the operator when excavation work is to be performed; and

C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection (1)(K).<sup>[60]</sup>

Subsection (1)(K) requires notice to customers addressing gas pipe maintenance, corrosion, leakage, excavation, inspection, and repair. That duty does not change under Sheet R-34.

Sheet R-34 Paragraph 3 simply imputes knowledge to the customer, that customer equipment may fall out of conformity with safety standards, and makes Company communication irrelevant to that imputation.

[3] . . . As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware

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<sup>60</sup> 4 CSR 240-40.030(12)(S)2.

of this fact, and Company shall owe customer no duty to warn of potential hazards that may exist with such facilities on the delivery side of the gas meter, its related appurtenances and piping.

The context of “potential hazards that may exist” is the potential “fail[ure], malfunction, or . . . disrepair” of customer equipment “at any time[,]” of which only the customer has the duty to be aware. By contrast, the Company’s duty to give information under 4 CSR 240-40.030(12)(S) arises only at a specified time and only as to specific information.

No general “duty to warn of potential hazards” exists under 4 CSR 240-40.030(12)(S). The regulation and the tariff address different conduct by different persons. The Commission concludes that Sheet R-34 is not inconsistent with 4 CSR 240-40.030(12)(S).

*(ii) May or Shall Discontinue Service*

In Complaint Paragraph 10(b), Staff cites the Company’s duty to discontinue service. Sheet R-34 Paragraph 2 provides:

[2] Company **may** refuse or **discontinue** service if an inspection or test reveals leakage, escape or loss of gas on customer's premises.

Under the regulation Paragraph (12)(S)3, the Company may also discontinue service:

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.

But the regulation also requires discontinuance of service when unsafe, and no waiver of that regulation appears in Sheet R-34, so Sheet R-34 does not alter that requirement. Reading the provisions in harmony, Sheet R-34 merely re-states the regulation’s provision that service may continue, and the regulation states when that may happen.

Therefore, the Commission concludes that Sheet R-34 is not inconsistent with 4 CSR 240-40.030(12)(S).

*(iii) Summary as to Published Regulations*

The Commission will deny Staff's motion, and will grant summary determination for the Company as to Complaint Paragraph 10.

C. Unpublished Regulation

In Complaint Paragraphs 7, 8, and 11, Staff argues that Sheet R-34 violates public policy. In support, Staff cites the Laclede decision. The Laclede decision, Staff argues, constitutes "an authoritative statement of Commission policy."<sup>61</sup>

In other words, Staff alleges that the Commission has made a statement declaring the policy generally applicable to tariff provisions that limit liability. The Company refutes Staff's argument by citing the Laclede decision's language as follows:

Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so **in this case** because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. **Laclede has produced no convincing evidence** that it would be in the public interest for the Commission **to limit liability in the manner it proposes**. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs. [<sup>62</sup>]

As the Company notes, the Laclede decision only determined the issues in that action on the record in that action. The Commission determines any contested case, including

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<sup>61</sup> *Complaint*, page 4, paragraph 8.

<sup>62</sup> *Id.*, *Report and Order*, January 13, 2010, page 13.

the propriety of any tariff provision, based on the facts of that case. The tariff order did not declare a policy statement about tariff provisions generally.<sup>63</sup>

The Laclede decision's language negates an element of Staff's claim. That conclusion does not support dismissal but supports a decision on the merits. Therefore, the Commission will deny Staff's motion and grant summary determination for the Company as to Complaint Paragraphs 7, 8 and 11.

#### D. Facially Unjust and Unreasonable

In Complaint Paragraph 9, Staff argues that Sheet R-34 is unjust and unreasonable on its face as to some of its provisions. As to those provisions, the Company argues that Sheet R-34 does not mean what it says. But a tariff has the same force and effect as a statute so, where needed, the Commission will apply the rules of statutory construction.<sup>64</sup> Of those rules, the first is that the rules do not apply when the provision's intent is clear.<sup>65</sup> If conflict is apparent, the Commission will harmonize provisions whenever possible.<sup>66</sup> Regulations are subject to the same principles of construction as statutes.<sup>67</sup>

#### *(i) Delivery Side and Customer Side*

The Commission must first clarify certain terms in the context of Staff and OPC's arguments. Staff and OPC argue that Sheet R-34 unjustly and unreasonably immunizes the Company from duties as to the Company's property. OPC cites Sheet R-34 Paragraph 2:

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<sup>63</sup> Even if the tariff order contained a statement of general applicability, promulgation must occur before such a statement controls the disposition of a contested case. Sections 536.021 and 536.025, RSMo Supp. 2010.

<sup>64</sup> *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 584 (Mo. App., W.D. 2000).

<sup>65</sup> *Prince v. Division of Family Servs.*, 886 S.W.2d 68, 72 (Mo. banc 1972).

<sup>66</sup> *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986).

<sup>67</sup> *State ex rel. Western Outdoor Advertg. Co. v. State Hwy. & Transp. Comm'n of Mo.*, 813 S.W.2d 360, 363 (Mo. App., W.D.1991).

[2] 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.

(Emphasis added.) But that liability-limiting language is expressly restricted to leakage from the customer's property. Also, Staff cites Paragraph 5:

[5] 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 [.]

Staff alleges that "the delivery side of the meter" is the Company's side. But the Company shows that the delivery side means the customer side by citation to Sheet R-34 Paragraph 3.

[3] The Company does not own . . . any piping, vents, or gas utilization equipment on the delivery side of the gas meter [.]

The Company's uncontroverted affidavit<sup>68</sup> confirms that reading. The Commission concludes that the delivery side of the meter is the customer side of the meter.

*(ii) General Immunity for Negligence and Less*

As to the customer side generally, Sheet R-34 Paragraph 5 immunizes the Company, from events not within the Company's control, and from the Company's negligence.

[5] 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 . . . 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.

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<sup>68</sup> MGE's Response to Staff's Motion for Summary Determination, Exhibit 1, page 2, paragraph 9.

(Emphasis added.) The ellipses stand in lieu of a lengthy itemization of circumstances set forth at length in Appendix 1. Those circumstances, OPC argues, purport to nullify circuit court judgments. But the deleted language merely grants immunity for losses due to a court-ordered service stoppage.

In Warner v. Southwestern Bell Telephone Company,<sup>69</sup> the Missouri Supreme Court held that a tariff may limit the immunity from ordinary negligence as to failure to correctly edit a telephone book.<sup>70</sup> Under that authority, immunity for negligence is not against public policy for ordinary business activities. Accordingly, immunizing the Company from culpability that is less than ordinary negligence cannot be against public policy for ordinary business activities. The Commission concludes that immunity for negligence is not generally contrary to the public interest.

The Commission will deny Staff's motion for summary determination, and grant summary determination for the Company, on that issue.

*(iii) Immunity Specifically for Inspection, Leakage, and Repair*

But immunity for beyond ordinary negligence, and for matters peculiar to the gas industry, also appears in Sheet R-34. Sheet R-34 Paragraph 3 incorporates equipment standards, including those of the Company.

[3] All piping, vents or gas utilization equipment furnished by the owner/customer of the premises being served shall be suitable for the purposes hereof and . . . in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company.

Sheet R-34 Paragraph 3 also provides that conformity with those standards is the customer's duty.

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<sup>69</sup> Warner v. Southwestern Bell Telephone Company, 428 S.W.2d 596 (Mo. Div. 2, 1968).

<sup>70</sup> 428 S.W.2d at 601-04.

[3] . . . 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.

(Emphasis added.) Further, customer equipment conformity is never the Company's duty under Sheet R-34 Paragraph 3.

[3] 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 [.]

(Emphasis added.) Moreover, Sheet R-34 Paragraph 2 releases the Company for all liability based on customer-side leakage.

[2] 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.

(Emphasis added.) Under those provisions, the Company never has any liability for any inspection, leakage, and repair on the customer side, on any facts, regardless of causation and culpability.

Immunity for conduct more culpable than ordinary negligence is against Missouri's public policy according to the Missouri Supreme Court. Warner v. Southwestern Bell Telephone Company.<sup>71</sup> Also, gas leakage is not a risk associated with other businesses. The Commission's voluminous gas safety regulations constitute a policy statement that natural gas is a noxious and combustible substance warranting high safety precautions. Such precautions are only in the customer's control to a limited

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<sup>71</sup> 428 S.W.2d at 601-04.

extent. Liability for negligence encourages the Company to take such safety precautions as are in the Company's control, which promotes the public interest.

Therefore, the Commission will grant Staff's motion, and deny the Company's motion for summary judgment, as to immunity for negligence related to inspection, leakage, and repair on the customer's side of the meter.

*(iv) Customer Liability*

Staff argues that Sheet R-32 makes the customer the Company's insurer by imposing duties and liabilities on the customer.

Staff cites Sheet R-34 Paragraph 4, which makes the customer liable for the conduct of third persons.

[4] The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless<sup>[72]</sup> and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

(Emphasis added.) That provision limits the customer's liability to damage caused by persons on the premises. While it is true that a trespasser may damage Company property, the customer is better able to prevent that occurrence than the Company. This is especially true as to meters inside houses. Under that reading, the Commission concludes that Sheet R-34 Paragraph 4 is not unjust and unreasonable on its face. The Commission will deny Staff's motion, and grant summary determination for the Company, as to Sheet R-34 Paragraph 4.

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<sup>72</sup> To hold or save harmless also means to indemnify. *Missouri Pac. R. Co. v. Sonken-Galamba Corp.*, 274 S.W. 930, 932 (K.C. Ct. App., 1925).



Staff also cites Sheet R-34 Paragraph 1, which provides customer indemnity for all Company negligence, without limitation to the customer's claims or Company property.

[1] Customer shall **save** Company **harmless** from **all claims** for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer **unless** it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by **willful default or gross negligence** on the part of Company or its accredited personnel.

(Emphasis added.) That provision goes beyond Company immunity from customer claims of negligence (Sheet R-34 Paragraph 5) and customer indemnity for persons on the premises (Sheet R-34 Paragraph 4). It makes the customer liable to third persons, like an all-electric neighbor, for the Company's negligence.

That provision is unjust and unreasonable because it makes the customer liable to third persons for the Company's conduct. To indemnify the Company from those losses is the purpose of the commercial liability insurance, which is a cost of doing business. No public policy supports making an insurer out of a customer who is powerless—and is not paid—to control those risks.

Therefore, the Commission concludes that Sheet R-34 Paragraph 1 is unjust and unreasonable. The Commission will grant Staff's motion as to Sheet R-34 Paragraph 1. The Commission will deny summary determination for the Company, as to Sheet R-34 Paragraph 1.

*(v) Summary as to Facial Unjustness and Unreasonableness*

Sheet R-34 is unjust and unreasonable as to Sheet R-34 Paragraphs 2, 3, and 5 insofar as they purport to immunize the Company from liability against:

- any allegation of Company negligence relating to inspection,
- any allegation of Company negligence relating to leakage, and
- any allegation of Company negligence relating to repair.

Sheet R-34 is also unjust and unreasonable as to Sheet R-34 Paragraph 1.

### **III. Decision**

The origin and issues in this action find their genesis in Sheet R-34's drafting, which likely employed the same method as the Commission's statutes—the eclectic method.<sup>73</sup> That method draws on language already used in the industry. But the sources' disparate nature may hinder the creation and comprehension of a coherent whole. Contemporary techniques make clearer drafting possible. Therefore, the Commission will order the filing of a new Sheet R-34 in compliance with this order.

#### **THE COMMISSION ORDERS THAT:**

1. Dismissal is denied.
2. Summary determination for Southern Union Company (“the Company”) is:
  - a. Granted as to the Complaint Paragraphs 7, 8, 10, and 11;
  - b. Granted as to Complaint Paragraph 9 as set forth in the body of this order; and
  - c. Denied as to the remainder of the complaint.
3. The *Motion for Summary Determination* of the Commission's Staff is:
  - a. Granted as to Complaint Paragraph 9, as set forth in the body of this order, and
  - b. Denied as to the remainder of the complaint.

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<sup>73</sup> Public Serv. Comm'n v. Union Pac. R. Co., 197 S.W. 39, 40 (Mo. banc 1917).

4. The provisions of the Company's tariff P.S.C. MO. No. 1 Fourth Revised Sheet R-34 that are unjust and unreasonable, as set forth in the body of this order, are void and unenforceable.

5. No later than December 9, 2011, the Company shall file a P.S.C. MO. No. 1, Fifth Revised Sheet R-34 ("new tariff sheet"). The new tariff sheet shall set forth terms of service that are not unjust and unreasonable as set forth in the body of this order. The Company shall file the new tariff sheet under this file number.

6. This order shall become effective on November 19, 2011.

7. This file shall close on November 20, 2011.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Gunn, Chm., Davis, Jarrett, and  
Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

## Appendix 1: Sheet R-34

### General Terms and Conditions for Gas Service

#### 3.19 COMPANY LIABILITY:

[1] Customer shall save Company harmless from all claims for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by willful default or gross negligence on the part of Company or its accredited personnel.

[2] 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.

[3] 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 being served shall be suitable for the purposes hereof and 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. As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware of this fact, and Company shall owe customer no duty to warn of potential hazards that may exist with such facilities on the delivery side of the gas meter, its related appurtenances and piping.

[4] The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

[5] 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 commence delivery, or failure of service or delay in commencing service due to accident or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bona fide 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.

## Appendix 2: Regulation 4 CSR 240-40.030

### (10) Test Requirements.

#### (J) Test Requirements for Customer-Owned Fuel Lines.

1. At the initial time an operator physically turns on the flow of gas to new fuel line installations—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure;

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met; and

C. The requirements of any applicable local (city, county, etc.) codes must be met.

2. The temperature of thermoplastic material must not be more than one hundred degrees Fahrenheit (100°F) during the test.

3. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

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### (12) Operations.

#### (S) Providing Service to Customers.

1. At the time an operator physically turns on the flow of gas to a customer (see requirements in subsection (10)(J) for new fuel line installations)—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure; and

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met. This visual inspection need not be met for emergency outages or curtailments. In the event a large commercial or industrial customer denies an operator access to the

customer's premises, the operator does not need to comply with the above requirement if the operator obtains a signed statement from the customer stating that the customer will be responsible for inspecting its exposed, accessible gas piping and all connected equipment, to determine that the piping and equipment meets any applicable codes, standards, or procedures adopted by the operator to assure safe service. In the event the customer denies an operator access to its premises and refuses to sign a statement as described above, the operator may file with the commission an application for waiver of compliance with this provision.

2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

A. Information on how to contact the operator in the event of an emergency or to report a gas odor;

B. Information on how and when to contact the operator when excavation work is to be performed; and

C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection (1)(K).<sup>74</sup>

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.

4. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

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<sup>74</sup> 4 CSR 240-40.030(1)(K) requires notice to customers addressing gas pipe maintenance, corrosion, leakage, excavation, inspection, and repair.