

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

In the Matter of Missouri Gas Energy's       )  
Tariff Sheets Designed to Increase Rates       )  
for Gas Service in the Company's                )  
Missouri Service Area.                                )

Case No. GR-2009-0355

**APPLICATION FOR REHEARING**

**COMES NOW** the Office of the Public Counsel ("OPC") and for its Application for Rehearing states as follows:

On behalf of the customers of the Southern Union Company d/b/a Missouri Gas Energy (MGE), OPC seeks rehearing of the Commission's February 10, 2010 *Report and Order* (Order). OPC seeks rehearing of: 1) The Order's findings and conclusions regarding the decision to include all margin costs in a flat fixed charge for residential and small general service customers; and 2) The Order's findings and conclusions regarding energy efficiency funding.

On a positive note, OPC believes the Commission's acceptance of the terms of the Partial Stipulation and Agreement is a just and reasonable resolution of the issues addressed in that agreement. In addition, the Commission's decision to adopt MGE's actual capital structure over the proposed hypothetical capital structure will help protect consumers from the harms of forcing consumers to finance phantom equity. However, OPC is disappointed that the Order appears to ignore much of OPC's evidence and arguments on rate design and energy efficiency without so much as an explanation as to why OPC's evidence and arguments were dismissed.

### **Rate Design**

OPC seeks rehearing of the Order's findings and conclusions that authorize the use of the straight-fixed variable (SFV) rate design for residential and small general service (SGS) consumers. A rehearing and adoption of a rate design that maintains a level of margin recovery through a volumetric charge will protect consumers' interests in the residential and SGS classes by only requiring these ratepayers to pay their true cost of service without paying subsidies to other consumers within their class. Under the SFV rate design, consumers that use low volumes of natural gas will overpay the costs to serve them. OPC believes a rehearing is necessary to overcome the Order's errors, in that the Order's findings are arbitrary, capricious, unreasonable, and constitute an abuse of the Commission's discretion. OPC also seeks rehearing because the Order is not based on competent and substantial evidence, it is unlawful because it discriminates against low-volume and low-income ratepayers, and it fails to explain conclusions reached regarding OPC's argument and evidence.

**a. The Rate Design Decision is Unreasonable Because it Acknowledges the Harmful Impact of the SFV Rate Design But Provides Consumers With No Supported Findings that Energy Efficiency Programs Can Possibly Offset that Harm**

OPC seeks a rehearing of the Order's findings that the reasonableness of the SFV depends on and will be overcome by unseen energy efficiency programs. The Order adopts the SFV Rate Design in Paragraph 69 of the Order, which states in its entirety:

The Commission finds that it should adopt the Straight Fixed Variable rate design for both the Residential and the Small General Service (SGS) customer classes. This finding is based upon the Commission's determination regarding Energy Efficiency issues addressed *infra*.

Looking *infra* to the Energy Efficiency section of the Order, the Order finds that energy efficiency programs can lead to the reduction of wholesale natural gas prices (p.56), but that “MGE’s current energy efficiency funding levels will not result in sufficient savings to contribute to lower wholesale gas prices.” (p.58). The Order also finds that MGE’s programs cannot have a significant impact on wholesale prices (p.58) and that “[a] more significant level of investment in energy efficiency is required to potentially pressure natural gas wholesale prices lower.”

The Order then finds that MGE has been unable to spend the current level of energy efficiency funding, and the Order attempts to overcome this problem by simply stating that “new” programs will allow MGE to spend more, without identifying a single new program. The Order references the Surrebuttal Testimony of Mr. John Buchanan and testimony from Mr. Hendershot, despite the fact that neither witness identified any new programs or provided any evidence to suggest new programs are possible. The Order finds that simply targeting additional funding towards non-existent programs, “established as a condition for allowing a higher fixed customer charge, would assure that MGE would implement a slate of cost effective energy efficiency programs.” Again, the Order does not explain what new programs could possibly be implemented.

Next, the Order identifies the “break-even point” for those that are harmed from those that benefit from the SFV rate design and finds that 43% of MGE’s residential customers would be harmed under the SFV, and that the vast majority of these (93%) are space heating customers. This is the extent of the “findings” regarding the energy efficiency programs. The Order moves on to the “Decision” section and issues additional findings, including the finding that the SFV will harm consumers using between 400 and

824 Ccf, which fully ignores the customers with less than 400 Ccf annually who are also harmed by SFV, and which provides no citation to this finding. The Commission then decides that MGE shall identify these harmed customers and the collaborative shall identify and determine programs to “address the adverse impact of the rate design”, again without any evidence to suggest any additional cost-effective programs are possible. And to OPC’s surprise, the Order then states that “OPC shall propose specific EE programs or other programs to assist these customers.”

OPC’s response to this directive is that OPC is not aware of any program that would overcome the obvious harm on MGE’s low usage consumers caused by the SFV. If there were any known solutions to the inequities and hardships on low usage customers created by the SFV, OPC or another party would have proposed them by now. Furthermore, special energy efficiency programs are unlikely to benefit residential gas heating customers that already have low usage.

If the Commission wishes to require parties to propose solutions, OPC suggests that the Commission require the parties who promoted this policy, Staff and MGE, since both have far greater resources than OPC. Unfortunately, OPC is finding it more and more difficult to actively participate in all of the gas and electric energy efficiency collaborative and advisory groups due to the reduced level of resources that OPC has and the increased level of rate case and rulemaking activities at the Commission. OPC’s declining level of resources and potential future budget problems were discussed in at least one of the Commission’s Agenda meetings in the last few months.

Adopting the SFV rate design on the finding that energy efficiency programs or “other programs” will provide customers with the benefits of efficiency and conservation

is unsupported by the record and extremely speculative and premature in that no specific programs have been identified or analyzed to indicate whether additional levels of spending are even possible. OPC is not aware of any additional programs that can mitigate the harm of SFV on low usage customers, nor are any other parties aware of other programs, otherwise such programs would have been identified. Merely identifying a target spending level with absolutely no findings or evidence to show how those levels can be reached, as a basis for the SFV rate design, is a finding that is not based on competent or substantial evidence, and results in an order that is arbitrary, capricious, unreasonable, and an abuse of the Commission's discretion.

**b. The Findings Regarding Distribution Costs are Unreasonable**

OPC requests rehearing of the Commission's findings regarding the costs to provide gas distribution service, and in particular, the finding that the cost to serve all consumers within a class is the same. These findings indicate a significant misunderstanding of how distribution costs are incurred by a local distribution company (LDC) by focusing solely on short-term costs without considering long-term costs. In doing so, the Commission did not consider costs based on demand, which was a primary reason for the Court of Appeals' reversal of the Commission's first order adopting a SFV rate design. *State ex rel. Public Counsel v. Missouri Public Service Commission*, 289 S.W.3d 240, 256 (Mo. App. W.D. 2009). One of the reasons the Court of Appeals reversed the Commission was because the Commission did not consider "costs which are recovered or measured volumetrically" such as "storage costs, distribution measuring costs, and distribution regulating costs." *Id.* One substantial cost that varies based on demand is the long-term cost of distribution mains. The present Order does not consider

these demand based costs, or even acknowledge their existence, and therefore the cost findings are contrary to the overwhelming weight of the evidence. The Court of Appeals stated that “when an agency’s order indicates that the agency completely failed to consider an important aspect or factor of the issues before it, this court may find that the agency acted arbitrarily and capriciously.” *Id.* Accordingly, the Order is arbitrary, capricious, unreasonable, and constitutes an abuse of discretion. Furthermore, the miniscule evidence cited on pages 41 and 42 of the Order is not competent and substantial to support the Commission’s findings.

The Order also concludes that “the size of the delivery service facilities is independent of gas volume” which is not based on competent and substantial evidence and is contrary to the overwhelming weight of the evidence showing the obvious impact that peak day volumes have on the size and cost of MGE’s distribution system. The Court of Appeals recognized this, just as MGE’s tariff unequivocally recognizes that the sizing of mains is based on peak day volumes. (MGE Tariff Sheet No. R-35, Tr. 398).

The Commission’s erroneous understanding of how distribution costs are incurred suggests the Commission has not fully studied the record before it. If the Commission’s findings were accurate, MGE’s system would be sized identically regardless of whether it served 400,000 residential customers using gas only for water heating in small one-bedroom homes, or if it served 400,000 residential customers all in large 5,000 square foot homes using natural gas for water heating, space heating, fireplaces, cooking, and pool heaters. An important fact disregarded by the Commission is the fact that the sizing of the miles and miles of distribution mains are based on the demands placed on the system by the various sized customers, and the greater demand placed on that system by

larger users, the greater the size of pipe needed and the greater the costs those users have contributed to the costs of the system. By failing to acknowledge these costs, the Order wrongly concludes that the costs are caused equally, which has resulted in an Order that forces low-volume users to subsidize the costs incurred by large volume users. This unnecessary and unreasonable result is worsened by the fact that most low-income users are also low-volume users, which places a significant hardship on low-income ratepayers.

The Order wrongly concludes that a two-inch main is the smallest size of main used by MGE, when in fact the evidence shows that MGE's system uses mains of  $\frac{3}{4}$ " and  $1\frac{1}{2}$ ". By failing to recognize the reality of MGE's distribution system, the finding that the minimum sized main will serve over 99% of residential customers is simply incorrect. Furthermore, by focusing solely on the size of the smallest distribution mains, the Order ignores the impact that larger users place on the sizing of the larger distribution mains, which are sized based on peak day demand, which itself is impacted more by customers with greater usage. The Order is contrary to the overwhelming weight of the evidence regarding the sizing and cost causation of MGE's distribution system, and overlooks relevant material facts.

The overwhelming weight of the evidence before the Commission, including evidence from all parties, proves that at least 20% of the cost of serving residential customers is impacted by demand, and 34% of the cost of serving SGS customers is based on demand. By affixing a charge that requires all residential customers to pay the same rate, it forces customers that only require smaller distribution mains to pay the costs of larger distribution mains. OPC simply seeks a rate design that properly matches costs with cost causation, which the Order fails to do.

The most troubling aspect of the Commission's Order regarding its conclusions on cost causation is the complete disregard for OPC's evidence and arguments. The Commission did not appear to make the slightest attempt to acknowledge OPC's arguments and evidence, nor did the Commission attempt to explain why such evidence and arguments were not persuasive. By all appearances, the Commission did not even consider OPC's evidence in rendering its decision. By failing to consider OPC's evidence, the Order is arbitrary and capricious. *State ex rel. GS Techs. Operating Co. v. P.S.C.*, 116 S.W.3d 680 (Mo.App. W.D. 2003).

**c. The Finding that the SFV is Necessary to Level Monthly Bills is Unreasonable**

The Order states that a benefit of the SFV rate design is that it “reduces spikes in winter bills and moderates bill fluctuations throughout the year.” However, this benefit existed before the SFV for MGE ratepayers that wished to make level bill payments throughout the year. The existing level bill program actually provides a much better level bill program than the SFV because it applies to the entire bill, not just the 30% non-gas costs. Moreover, the program is voluntary and consumers are not forced to spread their bills over the year. If a consumer prefers to pay for their gas during the winter, when most gas is used, the traditional rate design provides that option which meets ratepayer expectations to pay higher heating bills in winter and higher summer cooling bills in summer. The finding that the SFV provides this benefit is unreasonable and contrary to the weight of the evidence.

Likewise, the conclusion that customers “saved on average about \$81.00 under the SFV” is misleading because it fails to recognize that customers will lose these “savings” by paying higher summer bills when customers are already battling high



electric home cooling bills. In short, the Order appears to simply adopt many of the so-called facts set forth by MGE and the Staff with little analysis as to whether those facts are indeed accurate. OPC asks that each Commissioner take a much harder look at its fact findings in the Order and avoid facts that are not based on competent and substantial evidence. OPC is disheartened by the multitude of facts that appear to have been inserted into the order simply to support an outcome and not because five Commissioners all believe those facts to be true. Incorrect factual findings in this case could harm not only the findings and conclusions reached in this case, but could provide obstacles in future cases when the Commission realizes its factual findings are in error.

**d. The Finding that Lower Income Consumers Use Above Average Levels of Gas is Incorrect and Unreasonable**

One of the most surprising findings in the Order was the finding that “low income customers in MGE’s service territory consume higher than average volumes” of natural gas. This finding is contrary to the overwhelming weight of the evidence, and flies in the face of common sense. Low-income customers simply cannot afford to use higher than average volumes of gas and they live in much smaller housing. The Order’s unsupported finding suggests a disconnect between the Commission’s understanding of Missouri’s low-income population and reality, which unfortunately has resulted in an order that fails to recognize the problems faced by this vulnerable population. The Order cites to the testimony evidence of Philip B. Thompson, a witness that has not presented his “low-income study” to any other Commission. OPC is not aware of any other commission in the nation has reached such an outlandish conclusion regarding the usage patterns of low-income consumers.

Mr. Thompson's study does not constitute competent and substantial evidence because he did not consider the true impact on low-income customers. The study simply lumps 1999 usage and income data together by zip codes, which blends usage levels among all levels of income. In fact, only "two or three points at most" used in Mr. Thompson's analysis were actually below the federal poverty guidelines according to the U.S. Department of Health and Human Services (DHHS). (Tr. 631). And those two or three data points show that the lower income zip codes have usage patterns below the 70 Ccf average. (Schedule PBT-2). In other words, Mr. Thompson's data actually supports data from multiple U.S. Government sources all demonstrating that low-income households have lower than average natural gas usage than higher income households. The Commission's reliance on Mr. Thompson's study to reach its conclusion on low-income usage patterns is contrary to the overwhelming weight of the evidence and is therefore unreasonable.

The weight of the evidence indicates that when *actual household* data is analyzed, as opposed to aggregated zip code data, there is a clear pattern showing that between 1998 and 2008, average annual expenditures on natural gas decreased as income levels decreased. (Ex.74, p.4). There has been absolutely no competent and substantial evidence presented to suggest that Missouri's service area would mysteriously buck this national trend, especially considering the fact that MGE's service territory is centrally located in the continental U.S., which suggests that MGE should be consistent with national figures.

The Order also errs when it states that Mr. Thompson's conclusions are supported by an analysis of MGE customers who receive low income energy assistance (LIHEAP).

The Commission's finding overlooks the fact that every one of those low-income consumers received "a subsidy specifically targeted to offset the cost of natural gas consumption." (Ex.74, p.4). In other words, their usage characteristics are distorted by the subsidy they receive. These LIHEAP recipients are not representative of all low-income ratepayers and represent only a small subset of the total population of low-income households. Mr. Thompson has provided nothing in his study or in his testimony that truly considers the usage characteristics of low-income consumers, and therefore, his testimony does not constitute competent and substantial evidence.

These low-income findings are another example of fact findings in the Order where OPC would be surprised if all Commissioners truly believed this finding to be accurate. Mr. Thompson's conclusion was patched together and sold to MGE by an expert that has never before presented such a conclusion to any other regulatory commission. An incorrect finding that low-income consumers use above average amounts of gas could have unforeseen future implications. OPC urges the Commission to rehear this issue and engage in a serious analysis of this data before reaching its findings. Consumers, especially low-income consumers being negatively impacted by this Order, deserve the Commission's utmost attention when the Commission makes these life-altering decisions.

**e. The Findings that the Traditional Rate Design Creates Intra-Class Subsidies is Unreasonable**

Throughout the 97 year history of the Commission, OPC is not aware of any other Commission decision, other than the two 2007 decisions adopting the SFV, where the Commission reached the conclusion that the traditional rate design creates an intra-class subsidy. This argument is a fiction created by MGE and the Staff to support the harmful

shift of cost recovery to the 43% lowest-volume consumers. The Order's finding is based on evidence that is not competent or substantial and evidence that is arbitrary and capricious. The Order's findings constitute an abuse of discretion and are contrary to the overwhelming weight of the evidence.

**f. The Findings Regarding State Energy Policy Are Incorrect and Unreasonable**

The Order mischaracterizes the recommendations of the 2001 Natural Gas Commodity Price Task Force established in Case No. GW-2001-398. The Order issues a factual finding that is clearly incorrect when the Commission states that the Task Force included a "recommendation" that there be a redesign of base rates by placing more or all costs in a monthly service charge. In reality, the Task Force Report clearly states that moving to a higher commodity charge was merely an "option" raised by a party and not deliberated on by the Task Force. OPC asks that the Commission correct this clear factual inaccuracy. OPC never endorsed a rate design that would move more costs into a commodity charge. In fact, one of the "cons" of such a rate design recognized by the Task Force Report was that it would result in a situation where small users would be subsidizing larger users, and it would remove an energy efficiency price signal. (Schedule RJH-2, p.89). The Order's finding is unreasonable and is based on evidence that is not competent or substantial.

In addition, the Order cites to Mr. Hack's testimony to support the finding that "the Task Force recognized that a revenue decoupling rate design is an essential component of a meaningful natural gas conservation policy." The Order cites to a page in Mr. Hack's testimony where such a finding cannot be drawn. Accordingly, this finding is arbitrary, capricious, and is not based on competent and substantial evidence.

**g. The Order is Unreasonable Because it Ignores OPC's LMRRM Proposal to Align MGE's Interests with the Deployment of Cost-Effective Energy Efficiency**

The Order states that one factor to consider in deciding whether to approve a SFV rate design is aligning ratepayer interests with the interests of the utility's shareholders because of the removal of the disincentive for the utility to encourage natural gas conservation. OPC proposed a mechanism that accomplishes this goal while maintaining a traditional rate design, a mechanism that does not carry with it the negative impacts of the SFV rate design. Inexplicably, the Order makes absolutely no mention of OPC's recommendation to adopt a Lost Margin Revenue Recovery Mechanism (LMRRM). The LMRRM would remove MGE's disincentive to encourage natural gas conservation because any lost margins resulting from conservation programs would be recoverable by MGE through rates. OPC urges the Commission to rehear this case and properly consider OPC's proposal. At a minimum, the Order should explain why such a proposal was not addressed and not adopted. OPC is statutorily authorized to represent consumers, and its recommendations on behalf of Missouri's consumers should not be ignored by the Commission. §§ 386.700 and 386.710. The Commission should explain the basis for rejecting OPC's proposal, which will also assist OPC in representing consumers in future Commission cases. Until the Order is reheard and OPC's LMRRM proposal is considered and addressed, the Commission's Order is arbitrary, capricious, unreasonable and is an abuse of the Commission's discretion.

**h. The Order Discriminates Against Low-Volume and Low-Income Consumers**

The Order is unlawful because it forces more cost responsibility on low-volume consumers without justification, and by doing so discriminates against low-volume

consumers. Furthermore, this discriminatory result is most harmful on low-income ratepayers that would be paying more than the cost to serve them under the SFV rate design. This is true because costs that vary with demand, which all parties have recognized exist, would be paid equally by all ratepayers regardless of their contribution towards those costs. By requiring low-volume consumers to pay more than the cost to serve them, the Order subjects low-volume consumers to undue or unreasonable prejudice or disadvantage in violation of Section 393.130 RSMo. Since the traditional rate design takes into account all relevant factors regarding customer specific costs and distribution system costs, the move to a SFV rate design that eliminates the volumetric based cost will shift costs to low-volume users. Forcing low-volume consumers to pay the distribution mains capacity requirements caused by high-volume consumers is prejudicial in violation of the requirement that consumers not be subject to “any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” § 393.130 RSMo.

### **Energy Efficiency**

#### **a. The Order is Unreasonable Because it Does Not Require an Accurate Accounting of Surplus Energy Efficiency Funds**

In addition to the energy efficiency problems identified above, the Order also fails to require an accurate determination of the unspent surplus funds from the energy efficiency programs that were previously paid by ratepayers. The Order states that “MGE shall provide upfront funding using approximately \$1 million of surplus, unspent funds for residential energy efficiency programs included in rates.” Simply ordering an “approximation” of the unspent funds is not just and reasonable because it would allow MGE to pocket the surplus funds above \$1 million. § 393.130 RSMo. Instead, the Commission should order the collaborative to determine the current level of unspent

funds as of the date that new rates resulting from this case become effective. Mr. Ryan Kind testified that the amount of unspent funds could be closer to \$1,200,000 before the rate case is concluded. (Direct Testimony of Ryan Kind, p.5, line 1). MGE should use every dollar of the surplus for energy efficiency before any additional amounts are deferred to a regulatory asset account.

Making matters worse, the Order directs all amounts spent over \$1 million to be deferred through a regulatory asset account, which would likely result in the deferral of amounts already recovered from ratepayers, resulting in an unlawful double recovery of energy efficiency costs. § 393.130 RSMo.

### **Disregard for Consumer Argument and Evidence**

OPC's last reason for seeking rehearing is that the Order shows a pattern of disregarding the evidence and arguments of OPC without explanation, leaving OPC with little basis for understanding why OPC's evidence and arguments were dismissed by the Commission. This pattern repeats itself across multiple issues addressed by the Commission, and indicates that the Commission was not impartial in weighing the evidence, and instead only considered the evidence and addressed only those facts that the Commission believes supports the conclusion the Commission wished to reach. When a Commission order lacks impartiality, it constitutes an abuse of the Commission's discretion. Such impartiality and abuse of discretion resulted in an arbitrary, capricious, and unreasonable Order.

The Order does not satisfy the requirement that Commission Orders provide a basis for the Commission's decision because the Court has no basis for understanding the Commission's reasons for dismissing OPC's arguments on rate design and energy

efficiency as required by Section 536.090 RSMo. *Friendship Village of South County v. P.S.C.*, 907 S.W.2d 339 (Mo. App. 1995). “If judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation...by the Commission itself, make sense to the reviewing court.” *State ex rel. City of Lake Lotawana, et al. v. P.S.C., et al.*, 732 S.W.2d 191 (Mo. App. 1987). By not explaining its conclusions regarding OPC’s arguments and evidence, the Commission did not fulfill the requirements of Section 386.420 RSMo and Section 536.090 that requires the Commission to explain the basis for its findings and conclusions.

### **Conclusion**

For the reasons stated above, the Order is unreasonable because the evidence relied upon by the Commission is not competent and substantial. *State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C.*, 562 S.W.2d 688, 692 (Mo. App. 1978). The Order fails to consider all relevant factors contrary to the Supreme Court decision in *State ex rel. Missouri Water Co. v. P.S.C.*, 308 S.W.2d 704 (Mo. 1957), and authorizes an unjust and unreasonable rate design in violation of Sections 393.130, 393.140, 393.150, 393.230 and 393.270 RSMo. The Order does not properly consider all argument and evidence before it, and is therefore arbitrary, capricious, unreasonable, and is an abuse of discretion. 536.140 RSMo.

OPC is hopeful that the Commission will reconsider the Order in light of this Application for Rehearing. OPC has serious concerns that the Commission is not properly fulfilling its ratemaking function as it appears to be placing more emphasis on ensuring a particular dollar amount of energy efficiency funding is spent than it is focused on its primary objective of ensuring that all consumers of MGE are charged a



just and reasonable rate. At a minimum, OPC asks that the Commission rehear its Order and address the arguments and evidence presented by OPC and rewrite its Order to address these matters on all contested issues.

WHEREFORE, the Office of the Public Counsel respectfully requests rehearing of the Commission's February 10, 2010 *Report and Order*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 19<sup>th</sup> day of February 2010:

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