BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri Gas Energy's Tariffs Increasing Rates for Gas Service Provided to Customers in the Company's Missouri Service Area.	))))	Case No. GR-2006-0422

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("Public Counsel") and for its Application for Rehearing, pursuant to Section 386.500 (RSMo. 2000) and 4 CSR 240-2.160, respectfully states the following:

1. On March 22, 2007, the Missouri Public Service Commission ("Commission") issued, in a 3-2 vote, its Report and Order ("Order") bearing an effective date of March 30, 2007. Pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160, Public Counsel specifically sets forth the reasons warranting a rehearing below and moves the Commission for rehearing of its Order.

2. Public Counsel requests rehearing because the Order is erroneous, unlawful, unjust, unreasonable, arbitrary and capricious, unsupported by substantial and competent evidence and is against the weight of the evidence considering the whole record. Furthermore, the Order is in violation of constitutional provisions of due process under Mo. Const. (1945) Art. I sec. 10 and the Fourteenth Amendment of the United States Constitution, is in violation of constitutional provisions of equal protection of the law as guaranteed by the Missouri Constitution and the 14th Amendment, U.S. Constitution, and is unauthorized by law. The Order was made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion. The Order fails

to contain adequate findings of fact and conclusions of law setting forth the basic factual findings that support the conclusions set forth in the Order in a sufficient unequivocal affirmative manner so that a reviewing court could properly review the decision to determine if it was reasonable, all as more specifically and particularly described in this rehearing motion.

Rate Design

3. The portion of the Order adopting a straight fixed-variable (SFV) rate design does not contain sufficient findings of fact and conclusions of law. The Order explains the arguments made by the Commission's Staff, Public Counsel and Missouri Gas Energy (MGE) and finds the MGE and Staff arguments "persuasive." It is not entirely clear what facts the Commission identified and relied upon to reach its conclusion. The Order mixes arguments made by specific parties with possible findings, and as a result it is not clear if the Order is restating a party position or issuing a Commission finding. As a result, the reviewing court (and counsel) are left to guess what arguments the Commission found to be persuasive and what arguments were not persuasive or were rejected. Accordingly, the Order is unjust and unreasonable in violation of Section 393.130 RSMo (Supp 2005), is not based on competent and substantial evidence, and contains insufficient findings of fact in violation of Sections 386.420.2 and 536.090 RSMo RSMo 2000.

4. The few instances in the Order that even approach adequate findings of fact attempting to support a SFV rate design are not based on competent and substantial evidence on the record. The first such possible finding is that the SFV rate design aligns the objectives of shareholders and ratepayers because revenues will no longer depend on

how much gas MGE sells. However, simply removing an incentive for MGE to encourage usage does not truly align the objectives of shareholders and ratepayers. Ratepayers continue to want to lower their usage, while MGE's shareholders objectives are to profit from their investments. While it is true MGE offered a conservation program, the motivation for that offer is to achieve a guaranteed rate of return for investors through a Commission decision approving a SFV rate design. MGE is not motivated with a newfound desire to lower usage. MGE's shareholders have only moved towards indifference. MGE provided conservation and efficiency programs under the traditional rate design even without a SFV rate design. In addition, no attempt has been made to determine whether the loss of the conservation incentive available under the current rate design to *all* ratepayers (simply by reducing consumption) provides a more meaningful benefit for ratepayers than providing assistance to a select segment of ratepayers under a small fixed dollar amount. The Order does not factor all conservation losses and benefits to support a finding that conservation and efficiency will be best achieved under a SFV rate design.

5. The second finding that even approaches an adequate finding of fact regarding the SFV rate design is that it will promote accuracy because under the current rate design there are presumptions made on sales volumes to match fixed costs. However, the SFV rate design will actually promote inaccuracy by requiring low-volume users to pay for costs that should be attributed to high-volume users. The SFV rate design is based upon the false presumption that low-volume users subsidize high-volume users, which is the justification for the resulting shift in cost recovery from high-volume users to low-volume users. Removing the volumetric element and requiring all users to

pay an equal amount ignores the reasons current rates are based on both a volumetric and a fixed rate element. Current rates are based on these separate elements because certain costs attributed to a residential consumer are fixed regardless of usage (such as the meter, service line and regulator), while other costs are not fixed and vary depending on the demand a ratepayer places upon the system. The evidence in the case demonstrates that the SFV rate design will actually force low volume users to subsidize high volume users. Such a result will encourage more usage by the high volume users, and will be detrimental to the low-volume low-income consumers due to the unjustified rate increase on top of the $27.2 million revenue increase approved in the Order. The Order does not explain how such an impact on low-volume users is just and reasonable. It is also against the public interest to make no attempts to gradually increase such rate increase through the concept of gradualism to soften the impact to consumers. The Order is silent on gradualism, and did not even attempt to quantify the impacts that will be faced by low-volume gas users.

6. The third and last statement that even approaches an adequate findings is that the current rate design will exacerbate MGE's inability to recover its fixed costs. Nowhere has the Commission made the finding that MGE is unable to recover its fixed costs under the current rate design. If such a finding was implied by the Order, that implication is not supported by the record. The evidence on the record demonstrates that MGE earned nearly its entire authorized rate of return during the test year, and was praised by Southern Union Corporation's (SUC) CEO as performing "exceptionally well" and "the major contributor to the success" of SUC's gas distribution business. In other words, current rates not only allowed MGE to recover its fixed costs, but it also provided

a healthy return to its investors. Case law requires that MGE only be afforded an *opportunity* to earn its authorized return. The Commissions finding to the contrary is not supported by competent and substantial evidence on the record.

7. The Order does not make sufficient findings and conclusions regarding the impacts the SFV rate design will have upon the public. The Order appears to focus primarily upon the benefits that a SFV rate design would have on the shareholders of MGE. For this reason, the Order does not satisfy the obligation to protect the interests of the public. Missouri Courts have repeatedly held that the Commission's principal interest is to serve and protect ratepayers. *State of Missouri ex rel. Capital City Water Company v. P.S.C.,* 850 S.W.2d 903 (Mo. App. W.D. 1993). The protection given to the utility is merely incidental. *State of Missouri, ex rel, Crown Coach Company v. P.S.C.,* 179 S.W.2d 123 (Mo. App. 1944). A decision to allow a SFV rate design, and effectively eliminating a traditional rate design that has repeatedly been found to be just and reasonable to *both* shareholders and ratepayers for decades, requires considerable consideration to effectively protect the interests of the public. Without sufficient consideration of the public impacts, and without sufficient explanation of all presumptions underlying this significant change in rate design, the residential rate design portion of the Order is unjust and unreasonable. Nowhere in the Order does the Commission conclude that the SFV rate design will produce just and reasonable rates. The Commission simply concludes that the SFV rate design will protect MGE from the vagaries of weather and does not consider whether the rates are just and reasonable for the consumers.

8. An Order's reasonableness is based on whether: 1) the order is supported by substantial and competent evidence on the whole record; 2) the decision is arbitrary, capricious or unreasonable; or 3) the Commission abused its discretion. *Friendship Village v. P.S.C.,* 907 SW2d 339 (Mo. App. W.D. 1995). The portion of the Order approving the SFV rate design fails to satisfy all three reasonableness standards for the reasons explained above. All findings are not based on substantial and competent evidence, and are arbitrary, capricious, unreasonable and an abuse of the Commission's discretion. The *Friendship Village* decision also states that where an order of the Commission is clearly contrary to the overwhelming weight of the evidence it must be overturned. Public Counsel believes the Commission should grant rehearing because the Order is contrary to the overwhelming weight of the evidence as outlined above.

9. For the reasons outlined in Paragraphs 3 through 8, Public Counsel moves for rehearing on the grounds that: 1) the Order is unjust and unreasonable in violation of Section 393.130 RSMo (Supp 2005); 2) the portion of the Order approving the SFV rate design unsupported by substantial and competent evidence and is against the weight of the evidence considering the whole record; and 3) the findings identified in Paragraphs 3 through 8 are in violation of Sections 393.130 and 393.140 RSMo (Supp 2005).

10. The Order essentially guarantees MGE will recover its costs. Case law specifically states that the utility should be provided no more than an *opportunity* to earn its authorized return. In *State ex rel., Missouri Public Service Co. v. Fraas,* 627 S.W.2d 882 (App. W.D. 1981), the Western District held that a tariffed rate is intended to only permit an opportunity to make the percentage return approved by the Commission, and guarantees no specific return. The SFV rate design, however, guarantees a specific return

by recovering *all* non-gas costs in a fixed charge. Providing the utility with only an opportunity to earn a return, rather than a guaranteed return, protects ratepayers by encouraging the utility to operate efficiently. The SFV rate design will not only guarantee revenues for a monopoly regulated utility, but it will essentially shift risk from the shareholders to the ratepayers. This is another example of the Order placing far more emphasis on protecting the shareholders while providing no protections for the rate paying public the Commission is to protect. Accordingly, the Order is unjust, unreasonable and unlawful, and in violation of Section 393.130.1 RSMo 2000.

Natural Gas Conservation

11. The Order provides no findings of fact or conclusions of law regarding the conservation program, which violates Sections 386.420.2 and 536.090 RSMo RSMo 2000. The Order also "notes" that the conservation program is particularly in MGE's interest because "it provides an incentive for customers to switch from electric to gas water heaters." (Order p. 17). As such, the conservation program satisfies the definition of a prohibited promotional practice which would cause the rebate program to be in violation of Commission rules 4 CSR 240-3.255, 14.010, 14.020 and 14.030. In addition, the conservation program implementing a water heater rebate program does not require the installation of a water heater that is more efficient than the heater being replaced. The result could be a conservation rebate program that decreases efficiency rather than increases efficiency. Accordingly, the Order is unjust, unreasonable and unlawful, and in violation of Section 393.130.1 RSMo 2000.

Infinium Software

12. The Order allows MGE to amortize the retired Infinium Software over a five year period. Regardless of whether the used and useful concept has been applied by courts to rate base items, the fact remains that amortizing the retired Infinium Software will force ratepayers to pay through rates an expense for plant that is not being used. MGE testified that only a portion of the software is being used. Non-utility plant is not usually included in the determination of rates of a regulated public utility in Missouri. MGE's treatment of the booked value of the asset violates Generally Accepted Accounting Principles (GAAP) because the value of the plant was not booked. At the time MGE migrated to the new software, GAAP would have required MGE to record the booked value of the asset to a level that approximates its actual continued usage within MGE. The Infinium software portion of the Order is unjust and unreasonable in violation of Section 393.130 RSMo (Supp 2005) and contains insufficient findings of fact in violation of Sections 386.420.2 and 536.090 RSMo RSMo 2000.

Emergency Cold Weather Rule

13. The Order allows MGE to recover over $900,000 as a cost of complying with the Emergency Cold Weather Rule (ECWR). The Order makes no findings of fact. The Order simply restates the Staff's testimony and recommendation. The reviewing court (and counsel) must speculate as to what facts the Order relied upon. Furthermore, the Order allows MGE to recover costs not attributed to the ECWR as required by subsection (F)(c) the ECWR. The calculation approved by the Order violates the ECWR, 4 CSR 240-13.055, because it allows as costs amounts that were incurred by MGE with or without the ECWR. Existing arrearages are not costs of the rule – costs of the rule are

any additional unpaid arrearages accumulated after the consumer is reconnected or maintains service under the rule. The calculation approved by the Commission also fails to take into consideration any offsetting cost recovered from the consumer. For these reasons, the ECWR portion of the Order is unjust and unreasonable in violation of Section 393.130 RSMo (Supp 2005) and contains insufficient findings of fact in violation of Sections 386.420.2 and 536.090 RSMo RSMo 2000.

Kansas Property Tax AAO

14. The Order allows MGE to continue an AAO meant to recover a future property tax burden from ratepayers. The Order allows this despite the parallel issue involving the tax refunds which the Commission allowed MGE to retain. In that instance the Commission concludes that it is "unfair" to shift the tax burden to shareholders. However, the Order does not explain how it is fair to shift an unnecessary tax burden to ratepayers and allow shareholders to pocket tax refunds previously paid by ratepayers. MGE wishes to retain tax refunds received in Oklahoma outside of the test year, while also recovering from consumers tax obligations that occur outside of the test year. The Commission's attempt at achieving a "fair" result fails under the Order. For these reasons, the Kansas Property Tax AAO portion of the Order is unjust and unreasonable in violation of Section 393.130 RSMo (Supp 2005) and contains insufficient findings of fact in violation of Sections 386.420.2 and 536.090 RSMo RSMo 2000.

Commission's Procedure

15. The Order is also unlawful because it relies upon argument made by MGE in a brief that violated the Commission's procedural order. Despite the other parties' compliance with the limitation on the position statement, MGE violated the limitation

that the filing be simple and concise. As a result, MGE was afforded an unfair opportunity to present additional extensive briefing and unauthorized argument in violation of the order and a similar opportunity was not afforded to Public Counsel, all to the prejudice of Public Counsel. This is a violation of Public Counsel's constitutional right to due process. Public Counsel filed a motion for reconsideration of the Commission's decision to allow the disputed MGE position statement, and that motion has not been ruled upon. Public Counsel raised new concerns regarding the Commission's decision to allow MGE's position statement contrary to the established procedure ordered by the Commission. The Commission has not explained how those claims of prejudice are unwarranted. The Order is in violation of constitutional provisions of due process under Mo. Const. (1945) Art. I sec. 10 and the Fourteenth Amendment of the United States Constitution, is in violation of constitutional provisions of equal protection of the law as guaranteed by the Missouri Constitution and the 14th Amendment, U.S. Constitution, and is unauthorized by law. The Order was made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion.

WHEREFORE, Public Counsel respectfully requests that the Commission grant this application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been sent via email on this 29th day of March 2007:

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