

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

In re the Transportation Tariff)	
Proposed Modification of Missouri)	
Gas Energy filed on May 15, 2008)	Case No. GT-2008-0393
Proposing Changes to the Existing)	
Transportation Tariff)	

**OBJECTION, MOTION TO SCHEDULE HEARING,
REQUEST TO POST EX-PARTE COMMUNICATION
AND MOTION TO RECUSE**

COMES NOW the Midwest Gas Users' Association (Midwest) and for its Objection, Motion to Schedule Hearing, Request to Post Ex-Parte Communication and Motion to Recuse respectfully state as follows:

1. On May 15, 2008, Missouri Gas Energy filed a proposed modification to its transportation tariff ("MGE Tariff"). On June 12, 2008, Midwest filed its Objection and Request for Suspension of the MGE Tariff. On June 13, 2008, the Commission issued its Order Suspending Tariff and Directing Filing.

MOTION TO SCHEDULE HEARING

2. The Commission's authority to suspend a tariff is derived from Section 393.150. Unlike the broader rationale tied to the suspension of a telecommunications tariff,¹ the authority to suspend a gas tariff is directly tied to the requirement to conduct a hearing.

Whenever there shall be filed with the commission by any gas corporation . . . any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation,

¹ Section 392.220.4

electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation . . . affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.²

Thus, there is no ability to suspend without a hearing,³ nor is a legal distinction drawn because this proposed change concerns a regulation rather than a rate.⁴ As such, when the MGE tariff was suspended on June 13, 2008, the Commission was required to conduct a hearing.

3. Indeed, the Commission, in a recent filing in Cole County Circuit Court recognized its statutory requirement to conduct a hearing once a tariff is suspended. “However, should the PSC exercise its authority to suspend those proposed tariffs, a hearing *is* required and the case, necessarily becomes a contested case at that point.”⁵ Still again, “the Commission’s order suspending those tariffs, issued on July 5, 2006, converted the matter into a contested case because that action imposed the requirement of a hearing.”⁶

² Section 393.150.

³ “If suspended, the commission *must* within a specified period hold a hearing concerning the propriety of the new rate, charge, *rule or regulation*. Section 393.150.” *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. 1979) (emphasis added).

⁴ *Id.*

⁵ Case No. 07AC-CC00630, Respondent’s Brief, filed May 30, 2008, at page 59. (emphasis in original).

⁶ *Id.* at pages 59-60.

4. Given that the Commission is required to conduct a hearing in this matter, Midwest requests that the Commission schedule the hearing at its earliest available opportunity.

OBJECTION

5. Section 536.010(4) defines a contested case as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” (emphasis added). Therefore, when the Commission suspended the MGE tariff, this matter became a contested case, whether or not the Commission had taken the administrative action of scheduling that hearing.

6. Missouri statutes and rules provide for several due process rights in any contested case including: (1) the requirement that any decision be based upon competent and substantial evidence;⁷ (2) notice of any hearings;⁸ (3) the right to call and cross-examine witnesses;⁹ (4) the requirement that oral evidence be provided under oath;¹⁰ (5) the ability to object to evidence;¹¹ and (6) the requirement that any oral evidence be transcribed.¹² Moreover, to the extent that oral evidence is accepted without objection, that objection is waived.

7. On June 19, 2008, the Commission discussed the pending MGE tariff in its weekly agenda session. At that meeting, the Commission solicited oral “evidence” from its Staff members on the merits of this case outside of the hearing room and without notice to the parties. In fact, upon questioning from a Commissioner, one Staff member

⁷ Section 536.140.2(3).

⁸ Section 536.067.

⁹ Section 536.070(2).

¹⁰ Section 536.070(1).

¹¹ Section 536.070(7).

¹² Section 536.070(4).

noticed that their position on the tariff would not be affected by a further suspension and then proceeded to discuss the merits of this matter (*i.e.*, the reasons why the tariff should be approved).

8. During the Commission's questioning of Staff, undersigned counsel attempted to interpose an objection to the procedure undertaken by the Commission. At that time, counsel was told to "shut up" or that the Commission would "have [him] physically removed from the building." Based upon such threats, the Commission unlawfully precluded counsel from interposing an appropriate and lawful objection to the procedure being employed by the Commission. Given that an objection must be raised or it is deemed waived and the fact that counsel was precluded through threats, intimidation and duress from lodging his objection concurrent with the offending event, counsel is lodging his objection at the earliest available opportunity.

9. As such, counsel lodges the following objection.

Counsel objects to the receipt of oral evidence outside the hearing room. While the Commission has yet to schedule a hearing, a hearing was required upon the suspension of this tariff on June 13, 2008. Given that a hearing is required by law, this matter is also a contested case and carries with it the various due process requirements attendant to a contested case. Included in those due process requirements is the requirement that oral evidence be received under oath (Section 536.070(1)), that all witnesses must be subjected to cross-examination (Section 536.070(2)), and that all parties be given the right to raise objections (Section 536.070(7)). Given that the Commission's process in the agenda room does not conform to any of these due process requirements, it is inherently unlawful and should cease until such point as those due process requirements can be recognized.¹³

¹³ Missouri's courts have been clear on the due process requirements that attend the Commission's processes. "Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *Tonkin v. Jackson County Merit System Commission*, 599 S.W. 2d 25, 32--33[7] (Mo. App. 1980) and *Jones v. State Department of Public Health and Welfare*, 354 S.W. 2d 37, 39--40[2] (Mo. App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. *Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J. Super. 412, 330 A. 2d 370, 373--374[7] (Ct. App. Div. 1974)." And *see, Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App., W.D. 1982).

REQUEST TO POST EX-PARTE COMMUNICATIONS

10. Consistent with the due process requirement that all decisions in contested cases be based upon competent and substantial evidence, as well as the parties' due process entitlement to a fair and impartial decisionmaker, the Commission has implemented 4 CSR 240-4.020. Included in the prohibitions outlined in that rule is the prohibition against ex-parte communications. Included in this rule is the following prohibition:

No member of the commission, presiding officer or employee of the commission ***shall invite or knowingly entertain*** any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent. (Emphasis added)

11. While the Commission may notice that its rule provides that the ex-parte prohibition applies "from the time that an on-the-record proceeding is set for hearing by the commission,"¹⁴ this requirement inevitably derives from the requirement that any decision in a contested case be based solely on competent and substantial evidence as well as the parties' due process right to a fair and impartial decisionmaker. As such, the Commission may not skirt the requirements of this rule by merely refusing to set a hearing that is otherwise required by law. Moreover, the decision NOT to suspend a tariff must also take into account all relevant factors.¹⁵

Moreover, even though it may be expedient and convenient to take "evidence" from the Staff in this manner without notice to other interested parties, Missouri courts have again stated that ". . . [N]either impulse nor expediency can be substituted for the requirement that such rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record." Article V. § 22 [now Section 18], Constitution of Missouri, V.A.M.S. *State ex rel. Missouri Water Co. v. Public Service Com.*, 308 S.W.2d 704, 720 (Mo. 1957).

¹⁴ 4 CSR 240-4.020(7).

¹⁵ "[T]he commission is nonetheless required, in determining whether or not to suspend the proposed rate, to consider all factors relevant to the proper maximum price to be charged." *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 56 (Mo. 1979).

12. Given that a hearing was required by statute, the fundamental protections contained in 4 CSR 240-4.020 apply. Recognizing that all parties may not have been present when the Commission “invited” the ex-parte communication, the Commission should notify those parties of the substance of its ex-parte communication as required by 4 CSR 240-4.020(8).

MOTION TO RECUSE

13. Following Staff’s discussion as to the merits of this matter, at least one commissioner stated his opinion as to the merits of the MGE tariff. Given that such decisions must be made based upon competent and substantial evidence on the whole record, one must necessarily question whether such decision is based upon the inappropriate communication with Staff. As such, to the extent that any commissioner has made up his / her mind, in part or in whole, based upon the communications with Staff, that commissioner is under an obligation to recuse himself or herself from further participation in this matter.

WHEREFORE, Midwest respectfully requests that the Commission take such further actions as are necessary and consistent with this pleading.

Respectfully submitted,



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ATTORNEYS FOR MIDWEST GAS
USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: June 25, 2008