

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of )  
Missouri Gas Energy, a Division of Southern )  
Union Company, Liability Tariff Filing )

File No. GT-2012-0183

Tariff No. YG-2012-0261

## ORDER APPROVING COMPLIANCE TARIFF SHEETS

Issue Date: February 3, 2012

Effective Date: March 5, 2012

The Missouri Public Service Commission is:

- Approving the new tariff sheets as substituted (“compliance tariff sheets”) of Southern Union Company (“the Company”).
- Denying the motions to suspend the tariff sheets (“motions”) filed by the Office of the Public Counsel (“OPC”).

The compliance tariff sheets provide that any one customer indemnifies the Company only for that one customer’s claims. That, and other language, complies with the Commission’s decision in File No. GC-2011-0100<sup>1</sup> (“the previous action”).

### a. The Previous Action

In the previous action, the Commission concluded that certain terms of the Company’s tariff sheet R-34 at rule 3.19<sup>2</sup> were unjust and unreasonable so the Commission ordered that such terms were void and unenforceable.

The unjust and unreasonable terms included a provision (“the deficiency”) requiring customer indemnity for negligence. The deficiency went beyond other terms,

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<sup>1</sup> *Staff of the Missouri Public Serv. Comm’n v. Southern Union Co., Final Decision and Order to File a New Tariff Sheets*, effective on November 19, 2011.

<sup>2</sup> The new tariff sheets also include a Rule 3.20. Rule 3.20 forgives charges for reconnection required by the May 22, 2001. That matter was not part of the previous action.

like indemnity for damage to Company property, and immunity from customer claims of Company negligence. The deficiency made the customer liable to third persons, like an all-electric neighbor, for the Company's negligence.

The Commission concluded:

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 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 ordered the Company to file a new tariff sheet correcting the deficiency.

#### b. Procedure in this Action

The Company filed new tariff sheets.<sup>3</sup> Staff agreed that the new tariff sheets corrected all unjust and unreasonable terms, except the deficiency, so Staff recommended rejection.<sup>4</sup> OPC filed the first motion to suspend ("*First Motion*").<sup>5</sup>

The Commission set a deadline for the Company's response to the recommendation and replies to the response.<sup>6</sup> The Company filed a response including an extension of the tariff effective date, a response to the recommendation and the

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<sup>3</sup> On December 9, 2011.

<sup>4</sup> *Staff's Recommendation to Reject Proposed Compliance Tariff*, filed on December 29, 2011. Staff also raises further concerns with the terms of liability. Because those concerns are outside the decision in the previous action, Staff does not rely on those concerns for its recommendation of rejection. Nevertheless, such concerns may be applicable to terms of liability for all tariffs, which is the subject of the Commission's investigation in File No. AO-2012-0173.

<sup>5</sup> *Public Counsel's Motion to Suspend Tariff*, filed on December 29, 2011.

<sup>6</sup> *Order Allowing Response to Recommendation and Motion*, issued January 3, 2012.

motion,<sup>7</sup> and a substitute tariff sheet.<sup>8</sup> The deadline for any reply was January 12, 2012. On January 13, 2012, Staff filed a reply that again favored rejection,<sup>9</sup> and OPC filed second motion to suspend (“Second Motion”).<sup>10</sup> Neither Staff nor OPC alleged good cause to expand the filing time as required by law.<sup>11</sup>

No law requires a hearing on a tariff sheet,<sup>12</sup> so this action is not a contested case, and the Commission need not separately state its findings of fact.<sup>13</sup>

### c. Compliance Tariff Sheets

To correct the deficiency, the substitute tariff sheet replaced a word in the new tariff sheets (struck through) with a different word (underlined) as follows.

Customer shall save Company harmless from ~~all~~ customer's 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.

OPC argues that the customer will be liable for Company conduct, but that is untrue if the Company is at fault. It is also untrue as to third parties. “All” was universal and “customer’s” is singular possessive. This means that any one “Customer” shall indemnify the Company only for that one “customer’s” claims. Staff’s only objection,

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<sup>7</sup> *Response of Missouri Gas Energy in Opposition to Staff's Recommendation to Reject Proposed Compliance Tariff and Public Counsel's Motion to Suspend Tariff*, filed on January 6, 2012.

<sup>8</sup> Filed on January 6, 2012.

<sup>9</sup> *Staff Response to Response of Missouri Gas Energy in Opposition to Staff's Recommendation to Reject Proposed Compliance Tariff*.

<sup>10</sup> *Motion to Suspend Substitute Tariff, Reply to MGE Response, and Request for Hearing*.

<sup>11</sup> 4 CSR 240-2.050(3)(B).

<sup>12</sup> Section 393.150.1, RSMo 2000.

<sup>13</sup> Section 536.010(4), RSMo Supp. 2010.

offered without analysis, is that replacing “all” with “customer’s” does not cure the deficiency. Perhaps Staff mistakes “customer’s” for customers’.” Whatever Staff’s understanding is, the compliance tariff sheets cure the deficiency.

#### d. Motions to Suspend

OPC asks for suspension of the tariff, commencement of a contested case, and an evidentiary hearing on matters other than the deficiency. Whether to grant the motion is within the Commission’s discretion.<sup>14</sup> Discretion’s bounds are careful consideration, the logic of the circumstances, and justice.<sup>15</sup>

OPC argues that the issues were not “fully vetted” in the previous action because the Commission decided the previous action on the merits without a hearing. Staff joins in that argument. But summary determination of the previous action was their idea. Staff filed a motion for summary determination<sup>16</sup> and OPC supported it.<sup>17</sup> The misgivings now voiced by Staff and OPC thus ring hollow.

OPC asks to re-litigate matters determined in the previous action. But OPC has already appealed the previous action.<sup>18</sup> OPC’s appeal may cause the motions to run afoul of “the longstanding rule against simultaneous trial and appellate court

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<sup>14</sup> Section 393.150.1, RSMo 2000.

<sup>15</sup> *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

<sup>16</sup> File No. GC-2011-0100: *Staff’s Motion for Summary Determination*, filed on December 1, 2010.

<sup>17</sup> File No. GC-2011-0100: *Public Counsel’s Suggestions in Support of Staff’s Motion for Summary Determination*, filed on June 2, 2011.

<sup>18</sup> *Office of the Public Counsel v. Missouri Public Service Comm’n*, Case No. WD 74732.

jurisdiction [.]”<sup>19</sup> In any event, litigating the matters that OPC is appealing, while OPC is appealing them, thwarts both administrative and judicial efficiency. Further evidence is no longer helpful for matters from the previous action.

OPC also asks to litigate the compliance tariff sheets as to arguments that lack merit on their face. OPC argues that someone might give tariff language an interpretation other than that set forth in the Commission’s decision. OPC also argues that the directive “[C]ustomer shall give no one, except [Company] access to [Company] property” is vague because “access” is undefined. No evidence is helpful on those matters.

On those considerations, the Commission will deny the *First Motion* and the *Second Motion* (“motions”).

#### e. Rulings

The Commission will deny the motions and approve the compliance tariff sheets.

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

1. *Public Counsel’s Motion to Suspend Tariff and Motion to Suspend Substitute Tariff. . . and Request for Hearing* are denied.

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<sup>19</sup> *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 267 (Mo. Ct. App. 2010), as modified (Mar. 30, 2010), reh’g and/or transfer denied (Mar. 30, 2010), transfer denied (May 25, 2010). For circuit court, that rule stands on Mo. Const. Art. V, Section 3. For the Commission, Mo. Const. Art. V, Sections 4 and 18 place supervisory jurisdiction in the Court of Appeals and provide direct review of Commission decisions. Under such provisions:

[T]he appellate court’s assumption of appellate jurisdiction removes the trial [tribunal]’s jurisdiction over the subject matter of the case. At some point a [decision] must become final. At that point the trial [tribunal]’s ability to act ceases and the appellate court’s ability to review commences. If that were not the case, continuing activity in a case appealed would make it unreviewable.

*Id.*, (footnote and citations omitted). OPC suggests that it may dismiss its appeal if the Commission grants its motions. *Second Motion*, pages 10-11, paragraph 22. The Commission declines that offer and stands by its decision.

2. The tariff sheets assigned Tracking No. YG-2012-0261 are approved.
3. The specific tariff sheets approved are as follows.

**P.S.C. MO. No. 1**

Fifth Revised Sheet R-34 replacing Fourth Revised Sheet R-34  
First Revised Sheet R-34.1 replacing Original Sheet R-34.1

4. This order shall become effective on March 5, 2012.
5. This file shall close on March 6, 2012.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Morris L. Woodruff, Chief Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 3<sup>rd</sup> day of February, 2012.