BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. GC-2011-0100
Missouri Gas Energy, a Division of Southern Union Company	)	
Respondent.	)	

RESPONSE OF MISSOURI GAS ENERGY IN OPPOSITION TO APPLICATIONS FOR REHEARING OF MISSOURI ASSOCIATION OF TRIAL ATTORNEYS, THE OFFICE OF THE PUBLIC COUNSEL AND CONSUMERS COUNCIL OF MISSOURI

COMES NOW Southern Union Company d/b/a Missouri Gas Energy ("MGE") and for its response in opposition to the Application for Rehearing of the Missouri Association of Trial Attorneys (MATA) and the Joint Application for Rehearing of the Office of the Public Counsel (OPC) and Consumers Council of Missouri (CCM), states the following:

General Observations

The Applications for Rehearing filed in this case by MATA, OPC and CCM should be denied. They are filled with mischaracterizations and hyperbole which obscures the narrow topic presented by MGE's Tariff Sheet R-34 and ignore the fact that the legal issues raised by MATA, OPC and CCM have been conclusively rejected by the Missouri Supreme Court. To the extent that the applicants have requested a hearing on those

matters found in favor of MGE, such relief is not appropriate under the Commission's Summary Disposition rule.

In reviewing the Applications for Rehearing filed by MATA and CCM, the Commission should consider the fact that neither entity is a proper party to this case, nor has either entity previously filed an application to intervene in the case, as is customary, in order to demonstrate an interest or to participate in the Commission's schedule of activities as permitted by its summary disposition rule or by any other procedural order providing for the filing of pleadings or briefs. Certainly, neither party has bothered to explain why it has waited until the eleventh hour to make itself heard. [1] Accordingly, their Applications for Rehearing should be denied as unauthorized in the context of a complaint case, which names specific complainants and respondents,[2] and/or as having been filed out of time.

[1] As the Commission will recall, this dispute has been pending for well over 3 years. The Staff initially filed its complaint on July 31, 2008 in Case No. GC-2009-0036 which was dismissed without prejudice on April 12, 2010. The Staff re-filed its complaint in this case on October 7, 2010. Clearly there has been more than ample time for MATA and CCM to become aware of the pendency of this dispute and make the Commission aware of their concerns before now.

[2] There is a fundamental unfairness to a process that would permit the intervention of numerous parties as ersatz complainants when they may not individually have the standing that the principal complainant asserts. Such piggy-backing should be discouraged as nothing more than an end run around the Commission's complaint rule in which a meaningful interest must be shown. It is a particularly pernicious activity when the end run presents itself, as here, in the form of an application for rehearing at the end of a very lengthy process. It is nothing short of a denial of the respondent's due process rights and works against the interests of procedural regularity and finality.

The Commission has the Authority to Approve Tariffs Limiting Liability because They Address a Term of Service Affecting Rates

The Application for Rehearing filed by MATA includes a laundry list of asserted constitutional and legal deficiencies with the Final Decision,[3] including the tellingly unsupported statement that the decision is somehow contrary to Missouri law.[4] These claims of error should be disregarded because MATA fails to acknowledge that Missouri Supreme Court long ago found that the Commission has the authority to approve tariffs limiting the liability of regulated utilities as an inherent part of its ratemaking authority. *State ex rel. Western Union Telegraph v. Public Service Commission*, 264 S.W. 669 (Mo. 1924); *Warner v. Southwestern Bell Telephone Company*, 428 S.W2d 596 (Mo. 1968).[5] The Commission recently cited these cases approvingly in its Case No. GT-2009-0056[6], Report and Order at pages 7-8. As such, there can be no serious question that the Final Decision, to the extent it granted summary relief in favor of MGE, is lawful.

MATA, OPC and CCM also point to the Commission's order in the *Laclede* case and assert, in various ways, that the Commission failed to take it into account, to reconcile it with the Final Decision[7] and/or that the Final Decision abrogated the

[3] MATA Application for Rehearing, ¶¶3, 4 and 6, (a) through (h).
[4] *Id*. at ¶3.
[5] OPC and CCM assert that the Commission's deference to the *Warner* decision is misplaced. They mistakenly claim it is a case addressing an error in a classified ad when in fact the errors in question were omitted directory listings and, consequently, not a question of private contract. The Supreme Court specifically noted this point. 428 S.W.2d at 601. Also, OPC and CCM have failed to mention the *Western Union* case, one that dealt directly with the provision of regulated utility service (i.e., non-delivery of messages). As such, their effort to distinguish the *Warner* case on its facts is misguided.
[6] *In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment*.
[7] OPC/CCM Application for Rehearing, ¶¶ 11-13.

decision in the *Laclede* case.[8] None of these assertions have merit. The Commission expressly distinguished the *Laclede* case in the Final Decision and noted that it was not a decision constituting a general public policy pronouncement that was binding on MGE and that it was not, therefore, determinative of the outcome in this case.[9] Also, there is nothing in the language of the Final Decision that purports to abrogate the holding in the *Laclede* case. In fact, the Commission could not do so in the context of this proceeding inasmuch as the *Laclede* decision has become final and is not subject to modification within the scope of the Commission's exclusive review procedures.

MATA's Application for Rehearing Goes Beyond the Undisputed Facts

In paragraph 2 of its Application for Rehearing, MATA asserts that those aspects of MGE's Tariff Sheet R-34 approved by the Commission "increase the risk of injury by MGE and deprive those harmed" of their right to a legal remedy. This claim is unsubstantiated speculation that is completely unsupported by any of the material facts that were admitted by the Complainant. Further, as discussed below, this decision does not change the Commission's natural gas safety rules, nor does it change the protections provided to MGE's customers by those rules. The claim should therefore be disregarded.

Applicants have Misstated the Scope of Protection Provided by Tariff Sheet R-34

To listen to the grievances set forth in the Applications for Rehearing, one would think that Tariff Sheet R-34 embodies an all encompassing legal shield to all manner of

[8] MATA Application for Rehearing, ¶6(i).
[9] Final Decision, pp. 19-20.

negligent conduct on the part of MGE. Where not outright wrong,[10] these claims are equal parts mischaracterization and exaggeration.

The 2006 revisions to Tariff Sheet R-34 were primarily intended to address those circumstances caused by the fact that the Commission, via its gas safety rules, compels MGE to enter upon a customer's premises and to inspect a customer's equipment prior to commencing the flow of natural gas.[11] *See*, Commission rules 4 CSR 240-40.030 (10)(J) and 4 CSR 240-40.030 (12)(S). As the Commission noted in the Final Decision, the circumstances primarily deal with equipment on the customer's side of the meter,[12] that is, beyond the interface with distribution system installed, owned and operated by MGE and recognizes the fact that the Company is "seldom on any customer's premises except to turn on service and respond to service calls."[13] The Final Decision in no way "increase[s] the risk of injury"[14] to MGE's customers as asserted by MATA because the Commission's natural gas safety rules[15] are in no way changed by the Commission's decision. As the Commission noted, these rules "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."[16] MGE's obligation to comply with those safety rules is no different today than it was before the Final

[10] ¶ 5 of MATA's Application for Rehearing misstates the nature of the Commission's holdings concerning the degree of culpability at issue in the tariff language.
[11] As noted in MGE's Application for Rehearing, the first and second paragraphs were not part of the revisions implemented in 2006 (other than the addition of one word) which means that language has been in place since at least 1994. It has not, to MGE's knowledge, been controversial or problematic for customers.
[12] Final Decision, p. 21.
[13] Final Decision, p. 5.
[14] MATA Application for Rehearing, ¶6.
[15] Including 4 CSR 240-40.030(10)(J) and (12)(S).
[16] Final Decision, p. 16.

Decision. The Final Decision, to the extent it has approved elements of MGE's tariff by granting summary determination in the Company's favor, therefore is a reasonable and principled balancing of ratepayer and shareholder interests.

The apparent objective of MATA is to make MGE a *de facto* insurer of last resort for its customers' failure to safely install or maintain their own piping and equipment. The Commission should reject this cynical effort by the plaintiff's bar to convert the Commission's well-intentioned gas safety rules into just another civil cause of action. To deny reasonable legal protections for performing a public service would be the embodiment of the adage that no good deed goes unpunished.

The OPC/CCM Request for Hearing is not an Available Remedy

OPC and CCM "urge the Commission to set this matter for an evidentiary hearing to give the parties an opportunity to provide evidence", but this request ignores the obvious point that the relief granted to MGE is pursuant to a summary determination on undisputed facts. As such, no hearing is available because the Commission's summary disposition rule[17] is expressly intended to resolve certain matters without the necessity of an evidentiary hearing. Holding an evidentiary hearing on those matters found in MGE's favor would be a monumentally wasteful outcome after all of the time MGE and the Commission's staff have expended in furtherance of a process calculated to have the singular purpose of avoiding a hearing on matters with respect to which there is no dispute as to material fact. If the Commission holds a hearing on its findings in favor of MGE, its summary disposition rule will become a dead letter.

[17] 4 CSR 240-2.117.

The Final Decision of the Commission Applied the Correct Standard in Granting Summary Relief in Favor of MGE and the Findings in the Final Decision are Sufficient

OPC and CCM claim that the Commission applied the incorrect test in granting Summary Relief to MGE. They also claim the Commission findings are deficient.[18] This is not so. The standard for approval of MGE's Motion for Summary Determination required a showing that (1) there is no genuine issue as to any material fact, (2) that the moving party is entitled to relief as a matter of law as to all or any part of the case, and (3) the Commission determines granting summary relief is in the public interest. *See,* Commission rule 4 CSR 240-2.117(E). In the Final Decision, the Commission determined that there was no genuine issue as to material facts alleged by MGE, that MGE was entitled to relief as a matter of law (looking to the *Warner* opinion) and that the relief granted serves the public interest.[19]

[18] Application for Rehearing, ¶¶7-9.

[19] OPC and CCM contend that MGE did not make a showing that summary determination in its favor is in the public interest, a claim that is demonstrably false. In its memorandum of law filed in support of its motion for summary determination, MGE stated the following:

> **Granting the Relief Requested in the Motion is in the Public Interest**
>
> As noted above, there is no actual dispute before the Commission as between MGE and any of its customers concerning the Company's application of the hold harmless provisions of its Tariff Sheet R-34. To wade into the concerns expressed by Staff absent the crystallizing benefit of an actual factual dispute will result in the issuance of little more than an advisory option which would be based on nothing more than supposition, speculation and conjecture. This makes for bad decision-making and poor regulation. Liability limitation provisions of the type contained in MGE's Tariff Sheet R-34 are fairly routine clauses. Staff concedes as much. [footnote omitted] Tariff sheets limiting the liability of Missouri utility in a variety of circumstances such as service or transportation interruptions, curtailments, or inspections of the condition of customer equipment are fairly standard. As recognized by the Missouri Supreme Court in its *Western Union Telegraph* and *Southwestern Bell Telephone* decisions, "the power to pass on the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates."

The Commission's Findings of Fact and Conclusions of Law concerning MGE's Motion for Summary Determination are clearly set forth in the Final Decision and a reviewing court will have no trouble understanding the basis for the Commission's holdings and reviewing it intelligently. *See, Glasnapp v. State Banking Board*, 545 S.W.2d 382, 387 (Mo. App. 1976). This is particularly so in a case such as this where there is no record evidence through which a reviewing court will need to sift in order to determine if the facts provide a reasonable basis of the order.

WHEREFORE, the Applications for Rehearing filed by MATA, OPC and CCM should be denied for the reasons aforesaid.

Respectfully submitted,

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The customers and Missouri ratepayers have been well served by the measured usage of these provisions as a feature to keep rates at reasonable and sustainable levels.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic transmission to all counsel of record on this 28th day of November, 2011.

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