**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF MISSOURI**

Locustwood Associates, )

)

Complainant )

)

Vs. ) **File No. GC-2018-0267**

)

Spire Missouri, Inc. d/b/a Spire )

)

Respondent )

**LOCUSTWOOD LEGAL MEMORANDUM IN OPPOSITIONTO RESPONDENT’S MOTION FOR SUMMARY DETERMINATION**

**COMES NOW** the Complainant, by and through the undersigned counsel, and pursuant to 4 CSR 240-2.117(C) files this Legal Memorandum in Opposition to Respondent’s Motion for Summary Determination and states as follows:

**Preliminary Statement**

Respondent’s Motion for Summary Determination should be dismissed for its failure to file any affidavits based upon personal knowledge and failure to attach all relied upon documents referenced in its filing. Such failure violates 4 CSR240-2.117(B) as well as Rule 74.04(e) of the Missouri Rules of Civil Procedure. In addition as discussed below, there are material facts in dispute which ultimately require evidentiary hearings before the Commission.

1. This case involves the actions of Spire Missouri Inc. (“Spire”) and its failure to act reasonable and prudently regarding the provision of service to Locustwood Associates (“Locustwood”). Spire’s action and inaction violated Section 393.130 (1) and (3) of RSMO, Section 393.140 (5) of RSMO, and 4 CSR 240-13.055 Cold Weather Maintenance of Service.
2. Locustwood submits that these provisions were violated by Spire when it failed to notify the Locustwood that the gas service to 9922 had been shut off. Section 5 of the Revert to Owner Agreement provides that MGE shall not automatically transfer gas service to Landlord. While it may have been reasonable not to immediately notify Locustwood of the shut off on September 8, 2017, Spire failure after several months coupled with the onset of cold weather violates Section 393.130(1) and (3)of RSMO, Section 393.140(5) of RSMO and 4 CSR 240-13.055.
3. Spire’s failure to act violates the statutory obligation for the *provision of safe, adequate, and proper service* (Section 393.130(1)) and was not just and reasonable (Section 393.130(1)). Spire’s action also*resulted in undue or unreasonable prejudice or disadvantage*(Section 393.130(3)). Similarly, Spire’s failure to act was not just and reasonable action contrary to and in violation of Section 393.140(5) of RSMO and the Commission’s Cold weather Maintenance of Service rules. The Commission adopted this rule to protect the health and safety of residential customer receiving heat-related utility service by placing restrictions on discontinuing and refusing to provide heat-related utility service from November 1, through March 31 due to delinquent accounts of those customers. This duty was also owed to Locustwood, as a customer and the owner of the property.
4. If Spire had notified Locustwood, Locustwood could have used the security deposit to pay off the past due amount and service would have been restored prior to cold weather that ultimately caused the pipes to freeze. Alternatively, Locustwood could have had service revert to owner and Locustwood would have ensured that heating was provided during the cold weather period covered by the rule. In fact, when Spire was called on December 30, 2017, Spire subsequently immediately restored service and billed Locustwood for the service. Spire’s failure to act prior to the cold weather period or in October 2017 is a failure to provide safe and adequate service and its inaction was unjust and unreasonable and otherwise violates Section 393.140(5) of RSMO and 4 CSR 240-13.055 and Spire’s action alsoresulted in undue or unreasonable prejudice or disadvantage to Locustwood(Section 393.130(3)).
5. Section 393.130 (1) of RSMO provide in pertinent part:

Every gas corporation… shall furnish and provide such service instrumentalities and facilities as shall be **safe and adequate and in all respects just and reasonable**…. All charges made and demanded by any such gas corporation….or **any service rendered, or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission**. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by lay or by order or decision of the commission is prohibited.

1. Section 393.130 (3) of RSMO provide in pertinent part:

No gas corporation… shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or **subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.**

1. Section 393.140 (5) of RSMO provide in pertinent part:

Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion after a hearing had upon its own motion or **upon complaint, that the rates or charges or the acts or regulations of any such person or corporation are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulation to be done and observed**;….

1. 4 CSR 240-13.050(4) discontinuance of service requires that the notice of disconnection shall contain the following information:
2. The name and address of the customer and the address, if different, where the service is rendered;
3. A statement of the reason for the proposed discontinuance of service and the cost of reconnection;
4. The date on or after which service will be discontinued unless appropriate action is taken;
5. How a customer may avoid the discontinuance;
6. The possibility of a settlement agreement if the claim is for a charge not in dispute and the customer is unable to pay the charge in full at one (1) time; and
7. A telephone number the customer may call from the service location without incurring toll charges and the address of the utility prominently displayed where the customer may make an inquiry. Charges for measured local service are not toll charges for purposes of this rule.
8. CSR 240-13.050(5) discontinuance of service requires that A utility shall not discontinue residential service pursuant to section (1) unless written notice by first class mail is sent to the customer at least ten (10) days prior to the date of the propose discontinuance. Service of notice by mail is complete upon mailing. As an alternative, a utility may deliver a written notice in hand to the customer at least nine-six (96) hours prior to the discontinuance. A utility shall maintain an accurate record of the date of mailing or delivery.
9. 4 CSR 240-13.055 Cold Weather Maintenance of Service: Provision of Residential Heat- Related Utility Service during Cold Weather states the policy of the Missouri Public Service Commission that heat related utility service should not be shut off from November 1, through March 31. The stated purpose is: This rule protects the health and safety of residential customer receiving heat-related utility service by placing restrictions on discontinuing and refusing to provide heat-related utility service from November 1, through March 31 due to delinquent accounts of those customers. Reporting requirements regarding heat-related utility service are found at1. 4 CSR 240-3.175 for electric utilities and at 4 CSR 240-3.250 for gas utilities.
10. 4 CSR 240-13.055(2) provides: This rule takes precedence over other rules on provisions of heat-related utility service from November 1, through March 31.
11. Based upon weather history for Kansas City at [www.almanac.com](http://www.almanac.com), the following low temperatures in 2017 were:

Date Temperature

10-28 30.0

10-29 32.0

10-31 28.9

11-8 28.9

11-9 32

11-10 26.1

11-19 30.0

11-22 21.9

12-6 30.9

12-7 19.0

12-8 18.0

12-9 28.9

12-10 26.1

12-11 30.9

12-12 23.0

12-22 28.9

12-23 21.9

12-24 21.9

12-25 19.0

12-26 10.0

12-27 1.0

12-28 12.9

12-29 19.9

12-30 10.0

12-31 8.1

1. The pipes were most likely frozen as of November 22, 2017 which required that water service had to be turned off. The rental unit at 9922 was not habitable since it lacked heat and water. October 2017 was warm and the residual warmth effect would have prevented the pipes from freezing in late October and early November.
2. For the period from September 8, 2017 to December 30, 2017, Locustwood had no notice from Spire that the gas service was shut off, and Spire took no action to notify Locustwood or revert service to Locustwood. Locustwood had a security deposit for 9922 which could have been used to pay any past due gas bills and to maintain service to the unit so that heat was available to the unit. Locustwood sustained damages to the unit in the amount of $3,079.50. Locustwood had a deductible of $2,500.00 on its insurance policy covering the unit. The insurance company paid Locustwood $579.50, which leaves a loss of $2,500.00 for which Locustwood is seeking recovery from Spire. Spire took no action after the shut off of service essentially adopting a shut off and forget it approach to the tenant and Locustwood. Spire took no action to bring a collection action, contact the tenant to enter into a payment plan with tenant or reach out to tenant/Locustwood prior to the start of cold weather in the fall of 2017 to attempt to resolve the issues. See Formal Complaint attached hereto. See Exhibit A, Customer Service logs.
3. Since Spire utility rates include an amount to reflect historical uncollectable amounts, Spire is under no compulsion to actively pursue collection action against gas customers. That is confirmed since Spire to no action to collect the past due amounts from 9922. More importantly, by a single phone call to Locustwood, Spire could have had the arrears paid out of the security deposit or alternatively revert the service to Locustwood. Spire failure to take any of these actions is not consistent with the obligations of a public utility. All ratepayers are adversely affected by such an approach.
4. Locustwood has set forth in its Response to Movant’s Statement of Material Facts and Complainant’s Statement of Material Facts in Dispute sufficient disputed facts and issues to warrant the denial of Spire’s Motion for Summary Determination. Any one of the disputed facts is legally sufficient to warrant denial of the Motion for Summary Determination. The specific facts in dispute are set forth in paragraph 12 thru 21. This memorandum will only focus upon some of the most compelling.
5. The revert to owner agreement has an ambiguity in it that must be construed against MGE. The language in paragraph 5 does not state that service will not be transferred to Landlord. Paragraph 5 implies that gas service will be transferred at some point. This paragraph does not state that turn off of gas will remain in place even when cold weather arrives or that if the gas is turned off prior to onset of cold weather, MGE has still will not turn on the gas and had no duty to Landlord. In addition, the contract may be unenforceable as a contract of adhesion.
6. The revert to owner agreement was with MGE and the agreement has no provision for assignment or transfer to another party and therefore is a factual issue as to Spire ability to enforce and/or bind Complainant.
7. Spire’s assertions about the agreement are mere speculation and conjecture and require the testimony from Customer Service Manager of MGE at time of execution in 2010. The relevant tariffs would be MGE’s tariffs in effect in 2010 when the agreement was signed and what the internal policies and procedures were of MGE regarding notifications. See Exhibit A, Customer Service Manager still employed by Spire.
8. In response to Staff 0001, Locustwood raised multiple violations of law by stating [w]hile it may have been reasonable not to immediately notify Locustwood of the shut off on September 8, 2017, Spire failure after several months violates Section 393.130 (1) of RSMO and Section 393.130 (3) of RSMO. In addition Spire failure to notify Locustwood prior to the onset of cold weather violates Section 393.130(1) of RSMO, Section 393.140(5) of RSMO and 4 CSR 240-13.055. The cold weather rule is intended to protect residential property and when there is no gas to a residential building, notice is reasonable and appropriate. See Exhibit A, cold weather notice to tenant in January 2017 and responses to interrogatories (First Set).
9. The service at 9922 was in the name of Ayanna Barker and Barker left the unit on or about September 1, 2017 and was not living at the unit when discontinuance notices were sent to her.
10. With the tenant not living at the unit, Spire had an obligation to notify the Landlord and transfer service to the Landlord.
11. The formal complaint is an appropriate proceeding to determine whether the totality of conduct by Spire is consistent with its statutory obligations under Section 393.130 (1) of RSMO, Section 393.130 (3) of RSMO, Section 393.130(1) of RSMO, Section 393.140(5) of RSMO and 4 CSR 240-13.055.
12. It is industry practice in commercial and residential leases that security deposits are required from a tenant. Spire response in paragraph 15 of its answer that it does not know is contrary to and an attempt to ignore industry practice and excuse their failure to take action that would have resulted in gas revenue from 9922. Spire’s response also raises issues of credibility which can only be resolved at hearing. There was no gas revenue until the service was turned on upon Locustwood’s call on December 30, 2017. Spire conduct violated the various provisions set forth in paragraph 23 above.
13. Spire states that the Commission’s cold weather rules address only multi-dwelling units. See rule 4 CSR 240-13.050(7) and not landlord-tenant issues. However 9922 is part of a multi-dwelling unit. The 9916-9922 is a multi-dwelling unit comprised of four apartments. The shut off of service in one unit in cold weather could affect the other units and expose all units to damage. Under RSMO Section 393.130 (3) or RSMO Section 393.140 (5). In this formal complaint, the Commission has the ability and should hold that in a situation where in a multi-dwelling unit, gas service is turned off prior the period provided in the cold weather rule, the landlord must be notified. Spire made no attempt to notify Locustwood. Such notification should have been done.
14. Locustwood requested copies of all revert to owner agreements from 2010 to the present in Interrogatory 9 and 10. Spire only provide two forms that are currently in use. See Exhibit A, Spire’s e-mail, response, and documents produces. The subject discovery responses are inadequate and did not fully respond to the request. As such, further discovery is required and therefore, Spire’s Motion for Summary Determination should be denied or dismissed until discovery is complete. In addition, the fact that Spire has two new forms raises several issues which preclude any action on Spire’s Motion for Summary Determination. First, Section 393.140(11) of RSMO requires Commission approval of any change in all forms of contracts. No evidence has been submitted that these two Spire forms or the MGE’s form with Locustwood were implemented in compliance with the requirements of Section 393.140(11). Second, Spire never notified Locustwood that a new form was available. That form is different from the MGE form. Spire’s action is unreasonable, unjust and discriminatory and denied Locustwood the opportunity to negotiate terms of service. This raises further issues whether these contracts are contracts of adhesion and otherwise unenforceable. Third, the current forms are equally unclear and ambiguous about what happens if gas is disconnected to tenant. Spire’s position appears to be that these new forms do not require Spire to ever notify landlord of any shut off, or to notify landlord that if gas is disconnected prior to onset of cold weather. The reference to tariffs in these agreements, are insufficient. Spire has an obligation to have its contracts that fully explain and set forth the rights of the parties to the agreement.

These contracts are misleading and appear calculated to mislead. These contracts are simply unjust, unreasonable, discriminatory, and violate applicable statutes and laws.

1. Locustwood submits that Staff’s report filed on September 7, 2018 and the conclusion contained therein are misplaced and incomplete. Staff’s report fails to address the fact that there a numerous material facts in dispute. Those facts affect any analysis of whether there are violations applicable statutes and rules of the Commission. Staff’s report did not address the various statutes relied upon Locustwood and focused only on safe, proper and adequate service. Locustwood also notes that Staff propounded discovery to Spire, Staff requests 0002-0007. That discovery was served on Locustwood, but no response to that discovery has been received by Locutwood. Responses to Staff discovery were due on August 22, 2018. This procedural defect alone is sufficient to warrant denial of the Motion for Summary Determination. Staff’s statement that the Commission cannot award damages is a red herring. The formal complaint set forth the amount in dispute and that amount is directly relevant to what procedures will apply. This formal complaint is subject to small claims procedure. Furthermore, a formal complaint is adjudication and a proper vehicle for the Commission to issue an appropriate order. See393.140(5) of RSMO (that section requires a hearing). Thereafter, Locustwood can pursue damages in an appropriate legal action.

In conclusion, and in view of the forgoing, Locustwood respectfully submits that the Commission should deny Spire’s Motion for Summary Determination based upon the arguments made herein and at the prehearing conference scheduled for October 3, 2018 set a hearing date for this matter.

Respectfully submitted,

**Christopher J. White**

Christopher J. White

Attorney for Locustswood

Missouri Bar No. 26752

120 Caterson Terrace

Hartsdale, NY 10530

Phone-914-391-5647

Fax 914-285-9653

c[jw01@optonline.net](mailto:jw01@optonline.net) e-mail

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served electronically, or hand-delivered, or via First Class United States Mail, postage prepaid, on all parties of record herein on this 21 day of September, 2018.

/s/Christopher J. White