

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

The Staff of the Missouri Public Service Commission,

Complainant,

vs.

Missouri Gas Energy, a Division of Southern Union Company,

Respondent.

Case No. GC-2011-0100

MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its Motion for Summary Determination pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

1. Staff filed its *Complaint* on October 7, 2010, asserting that Sheet R-34 of the tariff of Missouri Gas Energy (“MGE”), which purports to limit MGE’s liability to its customers, (1) is not just and reasonable pursuant to § 393.140(5), RSMo,¹ and (2) is not compliant with the Commission’s Gas Safety Rules, 4 CSR 240-40.030(10(J) and 4 CSR 240-40.030(12(S), and thus is in violation of a Commission rule pursuant to § 386.390.1. For relief, Staff prays that the Commission will make the findings requested by Staff and require MGE to file revised tariff sheets.²

2. Commission Rule 4 CSR 240-2.117(1) provides as follows:

(A) Except in a case seeking a rate increase or which is subject to

¹ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000.

² Staff does not seek penalties from MGE.

an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period. However, a motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission.

(B) Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and testimony, discovery or affidavits not previously filed that are relied on in the motion. The movant shall serve the motion for summary determination upon all other parties not later than the date upon which the motion is filed with the commission.

* * *

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

* * *

3. There is a Respondent in this case, to-wit: Missouri Gas Energy (“MGE”); and Respondent MGE filed its *Answer* on November 12, 2010; this motion therefore, is filed after Respondent has filed its responsive pleading as required by Rule 4 CSR 240-2.117(1)(A).

4. No hearing has been set in this case and therefore, this motion is filed more than sixty days prior to the hearing as required by Rule 4 CSR 240-2.117(1)(A).

5. There is no genuine issue as to the material facts set out in Paragraphs 6 through 12, below.

6. MGE admits in its *Answer* that Complainant is the Staff of the Missouri Public Service Commission (“Commission”) acting through the Chief Staff Counsel as authorized by Commission Rule 4 CSR 240-2.070(1).

7. MGE admits in its *Answer* that it is Southern Union Company, a Delaware general business corporation in good standing, headquartered at 5444 Westheimer Road, Houston, Texas 77056, which engages in the business of distributing natural gas at retail in Missouri under the registered fictitious name “Missouri Gas Energy” (MGE). Southern Union Company is properly registered as a foreign corporation doing business in Missouri and its registered agent is CT Corporation System at 120 South Central Avenue, Clayton, Missouri 63105. Southern Union’s Missouri headquarters is located at 3420 Broadway, Kansas City, Missouri 64111. Operating as MGE, Southern Union distributes natural gas for light, heat and power, using gas plant that it owns or operates, to approximately 501,000 residential, commercial and industrial customers in 34 Missouri counties under tariffs approved by this Commission.

8. MGE admits in its *Answer* that, by virtue of its activities described in Paragraph 7, above, MGE is a gas corporation pursuant to § 386.020(18) and a public utility pursuant to § 386.020(43), and is therefore subject to the jurisdiction of the Commission under sections 386.250 and 393.140.

9. MGE admits in its *Answer* that this Commission has authority to hear and determine complaints against public utilities pursuant to § 386.390.1, which provides that “[c]omplaint may be made ... in writing, setting forth any act or thing done or omitted to be done by any corporation ... in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the Commission”

10. MGE admits in its *Answer* that the Commission is expressly authorized to hear and determine complaints concerning the tariff provisions of public utilities by § 393.140(5), which provides:

[w]henever 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 persons or corporations 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** ... (emphasis added).

11. MGE admits in its *Answer* that on January 13, 2010, the Commission issued its *Report and Order* in Case No. GT-2009-0056, concerning certain tariff sheets proposed by Laclede Gas Company (“Laclede”) that purported to limit Laclede’s liability to its customers for damage resulting from Laclede’s negligence. Like Respondent MGE, Laclede is a public utility that distributes natural gas at retail in Missouri pursuant to tariffs approved by this Commission. In rejecting the proposed tariff sheets, the Commission stated:

Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so in this case because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. Laclede has produced no convincing evidence that it would be in the public interest for the Commission to limit liability in the manner it proposes. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede’s tariffs as proposed in the Amended Tariff and rejects the tariffs.

12. With respect to the averments in Paragraph 8 of the *Complaint*:

A. MGE admits in its *Answer* that the copy of Sheet R-34 attached to Staff's *Complaint* as Exhibit A is true and correct.

B. MGE does not admit that, on July 21, 2010, the Commission denied Laclede's timely-filed *Application for Rehearing and Alternative Request for Clarification*; however, the truth of that averment is demonstrated by the official docket sheet maintained by the Commission in its Case No. GT-2009-0056, a certified copy of which is attached hereto as Exhibit A and incorporated herein by reference.

C. MGE does not admit in its *Answer* that Laclede has not sought a writ of review with respect to the Commission's decision in Case No. GT-2009-0056, and that the time for doing so has now passed, but the truth of that mixed averment of law and fact is demonstrated by reference to (1) Exhibit A, the official docket sheet of Case No. GT-2009-0056, (2) Exhibit B, the affidavit of Steven C. Reed, Secretary of the Commission, explaining that said docket sheet does not show that the case was appealed and would show it had the case been appealed, and (3) § 386.510, RSMo, which provides that a writ of review must be applied for not more than thirty days after the Commission has denied the application for rehearing in the case sought to be reviewed. Exhibit A shows that Laclede's *Application for Rehearing* was denied on July 21, 2010, and the Commission may take official notice of the fact that the date on which Staff filed its *Complaint* – October 7, 2010 -- was more than thirty days after July 21, 2010.³

³ The Commission may take official notice of anything that a court may judicially notice. § 536.070(6), RSMo. Courts may take judicial notice of any fact that is common knowledge, *Elder v. Delcour*, 364 Mo. 835, 838, 269 S.W.2d 17, 19 (banc 1954), such as the fact that October 7, 2010, was more than thirty days after July 21, 2010.

D. MGE did not admit in its *Answer* that Staff now considers the *Report and Order* issued in Case No. GT-2009-0056 to embody an authoritative statement of Commission policy, but that fact is not material and need not be proved.

E. MGE did not admit in its *Answer* that Staff brings this action against MGE so that the Commission may take up and consider the liability-limiting provisions of MGE's current tariff Sheet R-34, but that fact is not material and need not be proved.

13. MGE denies in its *Answer* that its Tariff Sheet R-34 is not just and reasonable for any of the several reasons asserted by Staff in Paragraph 9 of the *Complaint*, but that is an ultimate issue and a conclusion of law, the truth of which is apparent from the facts set out herein as argued by Staff in its attached memorandum of law.

14. MGE denies in its *Answer* that its Tariff Sheet R-34 does not comply with the Commission's Natural Gas Safety Rules 4 CSR 240-40.030(10)(J) and 4 CSR 240-40.030(12)(S) for any of the several reasons asserted by Staff in Paragraph 10 of the *Complaint*, but that is an ultimate issue and a conclusion of law, the truth of which is apparent from the facts set out herein as argued by Staff in its attached memorandum of law.

15. MGE denies in its *Answer* that its Tariff Sheet R-34 is unjust, unreasonable, unlawful, and void and unenforceable as a matter of public policy as asserted by Staff in Paragraph 11 of the *Complaint*, but that is an ultimate issue and a conclusion of law, the truth of which is apparent from the facts set out herein as argued by Staff in its attached

memorandum of law.

16. MGE admits in its *Answer* that its representatives met with representatives of Staff on several occasions to discuss Staff's concerns with respect to Respondent's Tariff Sheet R-34 in the context of Staff's then-pending complaint in Commission Case No. GC-2009-0036. MGE further admits in its *Answer* that the parties were unable to resolve their differences in a manner that was mutually agreeable.

17. Attached hereto is Staff's separate legal memorandum explaining why summary determination should be granted, in that it is in the public interest and Staff is entitled to relief as a matter of law, and testimony, discovery and affidavits not previously filed that are relied on in the motion, all as required by Rule 4 CSR 240-2.117(1)(B).

18. MGE asserts several purported affirmative defenses in Paragraphs 13 through 17 of its *Answer*, none of which constitute a sufficient defense or avoidance of Staff's *Complaint* as fully explained in Staff's *Reply* filed herein.

WHEREFORE, Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order (1) finding that MGE's Tariff Sheet R-34 is unjust, unreasonable, unlawful, violates public policy, and is void and unenforceable, (2) finding that MGE's Tariff Sheet R-34 does not comply with the Commission's Natural Gas Safety Rules 4 CSR-240-40.030(10)(J) and 4 CSR 240-40.030(12)(S); and (3) pursuant to § 393.140(5), requiring MGE to file revised tariff sheets that are just and reasonable and in compliance with the Commission's rules and the law; and granting such other and further relief as the Commission deems just.

Respectfully Submitted,

/s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **1st day of December, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

s/ Kevin A. Thompson