

**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 TO STRIKE**  
**INSUFFICIENT AFFIRMATIVE DEFENSE**

**COMES NOW** the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, pursuant to Section 386.390, RSMo 2000,<sup>1</sup> and for its Motion to Strike Missouri Gas Energy’s insufficient affirmative defense at Paragraph 17 of its Answer, states as follows:

**Motion to Strike Insufficient Defense:**

A motion to strike an insufficient defense is equivalent to a motion to dismiss for failure to state a claim.<sup>2</sup> It is a demurrer that tests the legal sufficiency of a defense.<sup>3</sup> Consequently, the same standard should be applied in determining such a motion as is applied in the case of a motion to dismiss for failure to state a claim.

A motion to dismiss for failure to state a claim tests only the legal sufficiency of

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

<sup>2</sup> J.R. Devine, *Missouri Civil Pleading and Practice*, § 20-4 (1986).

<sup>3</sup> *Id.*

the complaint.<sup>4</sup> All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.<sup>5</sup> The complainant enjoys the benefit of all reasonable inferences.<sup>6</sup> The complaint should not be dismissed unless it shows no set of facts entitling it to relief.<sup>7</sup> These same standards should be applied in determining a motion to strike an insufficient defense.

**Respondent Has Insufficiently Pleaded Estoppel:**

In its Answer, at Paragraph 17, Missouri Gas Energy (“MGE”) pleads the following as an “affirmative defense”:

**17. Staff is estopped from making a complaint concerning the lawfulness and reasonableness of Respondent’s tariff sheet R-34.**

One purpose of an answer is to assert any affirmative defenses.<sup>8</sup> “An affirmative defense is one that wholly or partly avoids the cause of action asserted by the preceding pleading **by new allegations** that admit part or all of the cause of action, but avoids liability because of a legally sufficient excuse, justification or other matter negating the cause of action.”<sup>9</sup> Professor Devine points out, “[i]n alleging an affirmative defense, care must be exercised to allege all elements of the defense.”<sup>10</sup>

Respondent has not sufficiently pleaded the affirmative defense of estoppel because Respondent has not pleaded any facts showing that Complainant is estopped. It is not sufficient to simply state the word in a conclusory pleading; Respondent must

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<sup>4</sup> For this discussion, see J.R. Devine, *Missouri Civil Pleading and Practice*, § 20-3 (1986).

<sup>5</sup> *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> J.R. Devine, *Missouri Civil Pleading and Practice*, § 15-1 (1986).

<sup>9</sup> Devine, *supra*, § 15-2 (emphasis added).

<sup>10</sup> *Id.*

allege *facts* sufficient to show that every element of estoppel exists. In this case, Respondent has alleged no facts whatsoever, consequently, the asserted defense of estoppel is insufficient on its face and Staff's motion to strike must be granted.

**WHEREFORE**, Staff prays that the Commission will strike Paragraph 17 from MGE's Answer in that it insufficiently asserts the defense of estoppel; and grant such other and further relief as the Commission deems just in the premises.

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 **17<sup>th</sup> day of November, 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.

**s/ Kevin A. Thompson**