LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

December 31, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. AX-2003-0574

Dear Mr. Roberts:

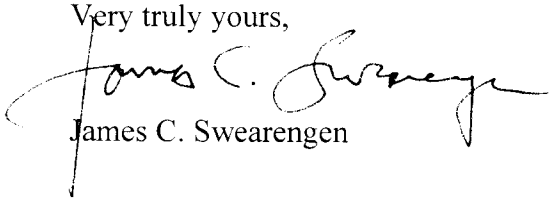
Provided herewith for filing on behalf of Missouri Gas Energy, please find in electronic format Comments of Missouri Gas Energy in the above-referenced case.

A copy of this filing will be provided to all parties of record.

Please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Very truly yours,



James C. Swearengen

JCS/lar
Enclosure
cc: General Counsel
Office of the Public Counsel

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Denial of Service Rule.	))	Case No. AX-2003-0574

COMMENTS OF MISSOURI GAS ENERGY

COMES NOW Missouri Gas Energy ("MGE"), a division of Southern Union Company, pursuant to the Notice published in the December 1, 2003 Missouri Register, Vol. 28, No. 23, and respectfully submits the following comments in response to the Missouri Public Service Commission's ("Commission") proposed Denial of Service Rule:

1. The rule proposed by the Commission should be withdrawn because: A) it will significantly increase Missouri utilities' cost of doing business, primarily in the form of reduced collections of revenues and corresponding increased bad debt expense; B) it will substantially increase the level of subsidy currently flowing from customers with good payment practices to customers who pay their gas bills less regularly; C) it constitutes unlawful single-issue rate making; and D) it seeks to change Commission-approved provisions currently in MGE's tariff without following the lawfully required procedure.

A. The Proposed Rule Will Significantly Increase the Cost of Doing Business.

2. Uncollectible revenue is an item included in the calculation of a utility's revenue requirement used to set prospective rates. In MGE's experience, the allowance for uncollectible revenue included in rates is typically inadequate, on average, in comparison to the level of uncollectible revenue actually experienced by MGE. The following chart compares MGE's actual uncollectible revenue to the allowance for uncollectible revenue included in MGE's rates over the past eight years:

Year	Actual Uncollectibles	Rate Case Uncollectibles	Difference
FYE 1996	$3,906,455	$3,409.662	$ (496,793)
FYE 1997	9,442,692	3,409,662	(6,033,030)
FYE 1998	4,469,856	3,409,662	(1,060,194)
FYE 1999	2,584,998	4,325,000	1,740,002
FYE 2000	1,696,606	4,325,000	2,628,394
FYE 2001	12,653,781	4,325,000	(8,328,781)
FYE 2002	3,211,390	4,323,292	1,111,902
FYE 2003	6,602,056	4,323,292	(2,278,764)
Total			**$(12,717,264)**

The shortfall, on average, equals $1,589,658 annually.

Over the last eight years MGE has under-recovered on uncollectible revenue by almost $1.6 million per year.

3. This $1.6 million average annual shortfall occurred despite the presence of the following provision in MGE's Commission-approved tariff:

> PRIOR INDEBTEDNESS OF CUSTOMER: Company shall not be required to commence supplying gas service if at the time of application, the applicant *or any member of applicant's household* (who has received benefit from previous gas service) is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. This provision cannot be avoided by substituting an application for service at the same or at a new location signed by some other member of the former customer's household or by any other person acting for or on behalf of such customer.
>
> In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account. Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein.
>
> (Section 3.02, Sheet Nos. R-19 and R-20 of MGE's tariff, emphasis supplied)

The Denial of Service Rule proposed by the Commission appears intended to nullify the foregoing italicized language currently in MGE's Commission-approved tariff.

4. The point of the foregoing is that MGE has been under-recovering on uncollectible revenue by approximately $1.6 million per year, on average, over the past eight years even with the availability of section 3.02 of its tariff. Section 3.02 permits MGE to deny service based on the indebtedness of a member of the service applicant's household. Nullifying this tariff provision would only cause MGE's uncollectible revenue-related shortfall to grow in excess of the existing $1.6 million average annual under-recovery. MGE has estimated that its uncollectible revenue would increase by approximately $0.9 million per year under the provisions of the proposed rule. MGE's shareholders should not, and under the law cannot, be required to bear these revenue reductions.[1]

B. The Proposed Rule Will Substantially Increase the Subsidy Customers with Good Payment Practices Currently Provide to Customers Who Pay their Gas Bills Less Regularly

5. All of the uncollectible revenue-related costs described in paragraphs 2 and 4, above—the $4.3 million currently in rates, the $1.6 million shortfall MGE has experienced on average over the past 8 years, and the $0.9 million in additional uncollectible revenue projected to result from the proposed Denial of Service Rule—as well as the $100,000 in additional costs associated with the excessive administrative and notice requirements[2] contained in the proposed Denial of Service rule cannot lawfully and reasonably be forced upon MGE's shareholders. Consequently, all such amounts should be reflected in rates to be paid by MGE's customers concurrent with implementation of the rule. In essence, this amounts to an approximate 16% increase

---

[1] See Section C herein for a discussion of Revenue Neutrality.

[2] MGE supports the comments of Laclede Gas Company regarding the inconsistency between the proposed rule and current Commission standards related to discontinuance of service.

in uncollectible revenue through which MGE's paying customers subsidize the gas service consumed by customers who do not pay their gas bills. MGE questions the reasonableness of taking action—such as adoption of the proposed Denial of Service Rule—which will require increasing this subsidy to non-paying customers by paying customers.

6. MGE has seen no evidence that Section 3.02 of its tariff (or corresponding tariff provisions of other Missouri utilities) is, or has been, implemented in a manner that is unfair or unreasonable to customers. Although differences of opinion do arise on occasion between MGE and customers regarding how to apply this provision of MGE's tariff, they do not arise with great frequency. In fact, from September 2001 through June 2003, approximately 89 of such situations were brought to the attention of the Commission's Consumer Services Department by MGE customers—virtually all of which were resolved at the informal level—and MGE's position was found to be justified in more than 75% of those instances. Thus, over this nearly two-year period, 0.005% of MGE's roughly 440,000 residential customers brought forward a complaint with the application of Section 3.02 of MGE's tariff that was found to have some justification. This track record does not justify elimination of Section 3.02 of MGE's tariff. In fact, the $1.6 million average annual shortfall MGE has suffered in relation to uncollectible revenue reasonably argues for increasing the types of collection tools that could be used rather than nullifying an existing collection tool as proposed in the Denial of Service Rule.

C. The Proposed Rule Constitutes Unlawful Single-Issue Ratemaking in that it Makes No Provision to Compensate MGE for Revenues that Will be Lost Due to Nullification of Section 3.02 of MGE's Tariff.

7. As explained in paragraph 8, below, when the Commission seeks to take action outside a general rate case that would serve to deprive a utility of revenues the utility would otherwise be entitled to collect, it can only do so with the utility's acquiescence or by providing the utility with revenue neutrality. The Denial of Service Rule proposed by the Commission wholly ignores the revenue losses that it would cause. MGE hereby advises the Commission that it does not acquiesce to the revenue losses that would result from implementation of the proposed Denial of Service Rule.

8. Missouri statutes provide that "[a]ll *rates, tolls, charges, schedules*[3] and joint rates fixed by the commission shall be in force and shall be *prima facie lawful*, and all *regulations, practices and services prescribed by the commission* shall be in force and shall be *prima facie lawful and reasonable* until found otherwise in a suit *brought for that purpose* pursuant to the provisions of this chapter." Section 386.270, RSMo 2000 (emphasis added).

By necessary implication, therefore, the revenue and earnings levels produced by such rates are also *prima facie* lawful until found otherwise in a suit brought for that purpose. In *Lightfoot v. City of Springfield*, 236 S.W.2d 348 (Mo. 1951), the Missouri Supreme Court established that a public utility company's revenues collected pursuant to lawful and approved rates are a property interest protected by the due process provisions of the state and federal constitutions. It concluded that funds impounded in a

[3] The description of "schedules" found in Section 393.140(11), RSMo 2000 makes it clear that "schedules" are what the courts commonly refer to as "tariffs."

federal court which were collected by a utility in accordance with rate schedules fixed by a regulatory agency were the property of the utility, not its customers. *Id.* at 353-4.

> [W]hen the established rate of a utility has been followed, ***the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal constitutions***.

Id. at 354 (emphasis added). This language stands for the proposition that the revenue and resulting earnings levels of a public utility collected under lawfully established schedules are the property of the utility company. Thus, *Lightfoot* establishes MGE's property rights to the revenues and earnings collected by it. In other words, once a utility collects revenues and earnings pursuant to lawful schedules, the utility cannot be deprived of them.

A party challenging those rates, charges and schedules bears the burden of showing that the Commission's previous findings are not reasonable or lawful. Section 386.430 RSMo 2000; *State ex rel. Gulf Transp. v. Missouri Public Service Commission*, 658 S.W.2d 448, 452[5] (Mo. App. 1983).

Similarly, any Commission action that deprives MGE of its existing revenue stream and earnings levels generated by lawful schedules amounts to a taking of property (i.e., the revenues and earnings) without due process of law in violation of the United States Constitution, Amend. XIV and the Missouri Constitution, Art. I, Sec. 10. *Id.* Therefore, outside of a rate case, the Commission is obligated to make a rate of return regulated public utility whole (i.e., revenue neutral) should the Commission's decision adversely affect the revenues or earnings that the public utility would have otherwise derived by virtue of its lawfully approved schedules.

Section 393.270.4, RSMo 2000 has been said to require the Commission to consider "all relevant factors" before it may order a change in any such rate to generate a different level of revenues. *State ex rel. Utility Consumers' Council of Missouri v. Missouri Public Service Commission*, 585 S.W.2d 41, 49 [10] (Mo.banc 1979); *State ex rel. Missouri Water Co. v. Missouri Public Service Commission*, 308 S.W.2d 704, 718-19[8] (Mo. 1951).

The Commission itself clarified this fact in its Order Rejecting Tariff, issued on April 3, 2001, in *In the Matter of UtiliCorp United Inc.'s Tariff Filed to Update the Rules and Regulations for Gas*, MoPSC Case No. GT-2001-484. In that case, UtiliCorp had filed new tariffs seeking to change interest paid on customer deposits, late payment charges, reconnection fees and charges for returned checks. The purpose of the tariff changes was to make the charges consistent between UtiliCorp's Missouri Public Service division and its newly acquired St. Joseph Light & Power division. Although the changes were sought for "various fixed charges," would not have affected "the rates charged for gas" and would have resulted in a revenue change of only "about $11,000 per year," the Commission found as follows:

> The law is quite clear that when the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider all relevant factors, rather than just a single factor.

It is also clear, as the Commission itself recognizes, that the Commission's duties and the limits on the Commission's authority extend beyond just the "rates charged for gas." The Commission has even gone so far as to reject, as single-issue ratemaking, a small telephone company tariff that would have introduced a $5.00 late-payment

charge. *In the Matter of the Chapter 33 Tariff Filing of Miller Telephone Company*, Report and Order, Case No. TT-2001-257 (December 12, 2000).

A recent example of an ill-fated Commission attempt to change a utility's revenue stream is discussed in *State ex rel. Alma Telephone Company, et al. v. Public Service Commission*, 40 S.W.3d 381 (Mo.App. 2001) ("PTC" Plan). The Cole County Circuit Court has also previously found similar principles required revenue neutrality in striking down the Commission's Community Optional Service orders. In *State ex rel. Contel of Missouri, et al. v. Public Service Commission*, Cases Nos. CV190-190CC, CV190-191CC and CV190-193CC, the Cole county Circuit Court reviewed the Commission's December 29, 1989, Report and Order in its Case No. TO-87-131 pursuant to which the Commission directed that all local telecommunications companies in the State implement an extended calling plan to be known as Community Optional Service. The Commission found that the implementation of this service:

> results in significant loss of revenue to secondary carriers. In some instances the secondary carriers would lose more revenue from the loss of these access charges than their customers would gain in rate relief from toll rates.

Nevertheless, the Commission refused to allow the secondary carriers to maintain revenue neutrality. It instead invited the affected companies to file revised permanent rate schedules (i.e., file rate cases) to recoup the lost revenues. The secondary carriers sought judicial review of this determination.

In an April 29, 1990 decision, Cole County Circuit Court reversed and remanded the case to the Commission. In doing so, it stated that "[r]ates fixed by the Commission are prima facie lawful until found otherwise in a suit brought for that purpose," and that if the Commission seeks to reduce the revenues that those rates would otherwise

generate, it must prove that the existing rates are unreasonable or unlawful, and not shift the burden of proof to the companies by requiring them to file a rate case if they want relief from the resulting decrease in their revenues and earnings. This decision was not appealed by the Commission.

The principle was also addressed in *State ex rel. Choctaw Telephone Company v. Public Service Commission*, Case No. CV193-66CC. This was a judicial review taken by Choctaw Telephone Company of the Commission's December 4, 1992, Report and Order in Case No. TR-91-86. Choctaw had filed revised tariff sheets to maintain revenue neutrality consistent with the Commission's May 1, 1990, order in Case No. TO-87-131 endorsing the concept of tariff filings made subject to true-up and refund for the purpose of keeping companies whole in connection with implementing Community Optional Service. The Commission refused to approve the revised tariff sheets, stating that Choctaw had failed to prove that it was achieving less than its authorized rate of return.

The Cole County Circuit Court reversed and remanded the case to the Commission, reiterating the constitutional and legal principles it had set forth in Case No. CV190-190CC. In doing so, it stated that "[I]f the Commission desires a LEC to offer a new service which will reduce the level of revenues that the LEC would have collected under existing rates without a finding of unlawfulness or unreasonableness, **the Commission must provide the LEC, at that LEC's election, with revenue neutrality**." (Emphasis added). The Court also stated that "if the Commission believes that revenue neutrality is not necessary for the LEC to continue to earn a reasonable rate of return upon the provisioning of COS, the Commission must institute a general

rate proceeding, **and allow suspension of the COS service during the pendency of that proceeding**." (Emphasis added). The Commission did not appeal this judgment.

Most recently, in consolidated Case Nos. CV198-666CC and CV198-694CC, the Cole County Circuit Court reversed the Commission's initial failure to provide revenue neutrality upon elimination of the Primary Toll Carrier ("PTC") Plan. The Commission's Report and Order in Case No. TO-97-217 et al. had stated that:

> The existing rate of return regulation mechanism for LECs is adequate to address any problem of over or under-recovery that may arise in the wake of elimination of the PTC Plan. An SC that experiences revenue losses impacting its provision of basic local service has access to the Commission's procedures for relief.

As was the case with Choctaw in Case No. TR-91-86, the Commission refused to allow for revenue neutrality. Instead, the Commission invited the companies to file a rate case if they experienced a revenue loss as a result of the Commission's action.

In its September 11, 1998, decision, the Court made reference to its prior decisions on this topic and again rejected the Commission's approach, stating:

> The Commission's denial of revenue neutrality to those companies which will experience revenue losses as a result of this transition to an ORP arrangement is an unconstitutional taking of revenues without due process and is a revenue reduction imposed by the Commission without considering all relevant factors.

The Circuit Court concluded that the companies' existing revenue streams are entitled to protection, and an order which reduces revenues generated by existing lawful rates of the companies amounts to an unlawful taking of monies the companies would have otherwise collected under approved schedules. Again, no appeal of the Court's order was taken by the Commission.

These decisions illustrate the principle that, at the very least, the companies whose revenues and earnings levels are affected by the Commission's actions in this proceeding must be given, at their election, reasonable assurances of revenue neutrality. Ultimately, the Commission must either: (1) make advance provision to keep the companies' revenues and earnings at current levels; or, (2) postpone the promulgation of the proposed rule to permit earnings reviews of all companies which propose to be made revenue neutral.

D. The Proposed Rule Seeks to Change MGE's Commission-Approved Tariff Without Following Lawful Procedures.

9. As a creation of the General Assembly, the Commission possesses only such authority as is conferred by statute. MGE's Commission-approved tariff is presumptively lawful and reasonable " . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." Section 386.270 RSMo. According to section 386.390.1

> [C]omplaint may be made by the commission of its own motion . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, . . . including any rule, regulation or charge heretofore established or fixed . . . for any corporation . . . or public utility, in violation, or claimed to be in violation, of any provision of law, or of any order or decision of the commission . . .

Thus, the complaint procedure of section 386.390 governs the handling of charges that a rule fixed for a public utility (such as section 3.02 of MGE's Commission-approved tariff) is unreasonable or unlawful. MGE has been unable to identify any provision of the law authorizing the Commission to use rulemaking procedures for the purpose of nullifying, changing or declaring unreasonable a specific Commission-approved tariff

provision. Consequently, this rulemaking proceeding can have no lawful impact on section 3.02 of MGE's Commission-approved tariff.

WHEREFORE, MGE respectfully requests the Commission withdraw its proposed Denial of Service Rule.

Respectfully submitted,

James C. Swearengen Mo. Bar 21510
Brian T. McCartney Mo. Bar 47788
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
573/635-7166
FAX: 573/634-7431
Email:lrackers@brydonlaw.com

Attorneys for Missouri Gas Energy

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 31st day of December, 2003, to the Commission's General Counsel and the Office of the Public Counsel.