BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Beverly A. Johnson,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. GC-2008-0295
	)	
Missouri Gas Energy,	)	
	)	
Respondent.	)	

MGE'S BRIEF

COMES NOW Missouri Gas Energy, a division of Southern Union Company (MGE or Respondent), and, as its brief, states as follows to the Missouri Public Service Commission (Commission):

SUMMARY

At the hearing of this matter, the Staff of the Commission (Staff) argued for the first time since the complaint was originally filed that Ms. Johnson's acknowledged debt to MGE was "time barred" pursuant to a five-year civil action statute of limitations. Tr. 24-25. Staff's reliance on a civil action statute of limitations is misplaced.

First, the courts have found that Missouri statutes of limitation are procedural and not substantive. In other words, the running of a statute of limitations only eliminates a procedure that otherwise could be used as a means of collection (such as the filing of a civil action), it does not change the fact that the underlying debt is owed.

Second, imposing a five-year civil statute of limitations is inconsistent with the very Commission rule at issue, which allows for a seven-year limitation when denying service to individuals who had received the "benefit of use" on unpaid accounts.

Finally, although it is irrelevant to the present action, if MGE chose to file a civil action in state court, it would be subject to a ten-year statute of limitation, rather than a five-year statute of limitation as Staff claims. Accordingly, MGE has operated within the requirements of its tariff and Commission rule in denying service to Ms. Johnson, whether or not the civil action statute of limitations may have run. The civil action statute of limitations is simply not applicable to this situation.

BACKGROUND

This case was heard by the Commission on August 22, 2008. Prior to the hearing, Staff filed a recommendation in this matter indicating that Ms. Johnson should be required to pay $520.06 in order to have gas service initiated at her new address. Further, the Staff's recommendation indicated that MGE had not violated its tariffs or the Commission's Denial of Service Rule (4 CSR 240-13.035) in refusing to initiate gas service at Ms. Johnson's new address.

During opening statements, and without prior notice, Staff counsel took a contrary position. Staff's novel argument at hearing was that that Ms. Johnson's acknowledged debt to MGE was "time barred pursuant to Section 516.120.1, [RSMo] [a five-year civil action statute of limitations] and that, therefore, the Commission's decision in this matter must be for the Complainant." Tr. 24-25. In other words, the Staff has argued that a statute designed to limit the time in which a civil action may be brought in state court somehow applies to a utility's denial of service to a customer with an acknowledged outstanding debt. Because the civil statute of limitations issue was raised by the Staff for the first time at the hearing, the Commission directed Staff and MGE to brief the statute of limitations issue. Order Setting Post-Hearing Procedural Schedule, September 12, 2008 (as corrected September 15, 2008); Tr. 86.

FACTS

Ms. Johnson has an outstanding balance in the amount of $957.74, associated with natural gas service provided in her name at 4200 E. 56th Street, Kansas City, Missouri. Tr. 40, 62. The service at 4200 East 56th Street was initiated in November of 1997 and was discontinued for non-payment in May of 2001. Tr. 66-67.

Ms. Johnson admits to having lived at 4200 E. 56th Street through February 14, 2001. Tr. 39. Ms. Johnson never asked that the service be discontinued, even though she was still receiving bills as late as April 16, 2001. Exh. 2; Exh. 5; Tr. 41-42, 67. Thus, the account was ultimately discontinued for non-payment.

Ms. Johnson has sought to initiate service in her name at a different address. Tr. 33-34. MGE's tariff and Commission Rules state that MGE may refuse to provide service where there is a failure to pay a delinquent charge (MGE Tariff, Rule 3.02; Commission Rule 4 CSR 240-13.035).

MGE previously asked that Ms. Johnson pay fifty percent (50%) of the outstanding debt ($478.00) before MGE will initiate service at the new address. Tr. 69-70. During periods covered by the cold weather rule, MGE has asked Ms. Johnson to pay an initial amount of $154.36, to initiate service. *Id*. Neither of these options were acceptable to Ms. Johnson. Tr. 70.

Working from the February 14, 2001 date that Ms. Johnson claims she left 4200 E. 56th Street, and providing Ms. Johnson the benefit of any doubt as to the remainder of her bill, MGE has during this case offered to remove $437.68 from the final account balance of $957.74, leaving a balance of $520.06 that Ms. Johnson would be required to pay to have gas service initiated at her new address. Tr. 70. However, Ms. Johnson continues to ask that the Commission direct MGE to write-off the entire bill. Tr. 24.

STATUTE OF LIMITATIONS

Commission rule and MGE's tariff allow MGE to deny service when an applicant has failed to pay an undisputed delinquent utility charge. Commission Rule 4 CSR 240-13.035(1); MGE Tariff, Rule 3.02. This is a provision that protects both MGE and its customers from additional bad debt. This is especially important in this case, as at no time during Ms. Johnson's previous tenure as a customer was her account ever paid in full. Exh. 3; Tr. 77. She even created doubt in her testimony as to whether she would pay her bill if service were initiated as a result of this case. Tr. 49-52.

The question raised by the Staff's opening statement is whether the running of a civil action statute of limitations acts to discharge an otherwise valid debt and prevent a utility from denying service to a customer who has a delinquent utility charge.

STATUTES OF LIMITATION ARE PROCEDURAL, NOT SUBSTANTIVE

The Southern District Court of Appeals addressed a similar issue in *Messner v. American Union Insurance Company*, 119 S.W.3d 642 (Mo.App.S.D. 2003). The question for the court in *Messner* was whether the plaintiff could establish that he was "legally entitled to recover" as to an underlying claim, even though the statute of limitations on that underlying claim had run. The Court of Appeals found that the statute of limitations was a procedural matter and did not affect the substantive nature of the underlying claim. It explained this decision as follows:

> The difference between "procedural" law (as discussed in *Oates* and *Edwards*) and "substantive" law (as discussed in *Baumgartel* and *Crenshaw*) has been explained thusly: Procedural law prescribes the method and manner of enforcing rights or obtaining redress for their invasion, while substantive law creates, defines, and regulates rights. *Wilkes v. Mo. Highway and Transp. Comm'n.*, 762 S.W.2d 27, 28[1] (Mo.banc 1988). "In Missouri, statutes of limitations are procedural in nature." *State v. Casaretto*, 818 S.W.2d 313, 316[6] (Mo.App. 1991). Statutes of limitations for wrongful death, however, are substantive. *Crenshaw*, 527 S.W.2d at 4[5].

> These distinctions are dispositive here. This is not a suit where the underlying cause of action would have been for wrongful death. It is a suit where the underlying claim was for personal injuries. Consequently, this appeal is governed by cases such as *Oates* and *Edwards* (where the time bar for the underlying suit was procedural in nature), and not by cases such as *Baumgartel* and *Crenshaw* (where the time bar for the underlying suit was substantive in nature). Although Defendant's right of subrogation--if one existed in this case (*see* n.8)--was destroyed by Plaintiff's failure to sue Tortfeasor within five years of the accident, that fact is irrelevant. *Oates*, 583 S.W.2d at 717-19. The running of the five-year statute of limitations was only a procedural bar to Plaintiff's suit against Tortfeasor, i.e., it did not destroy Plaintiff's ability to show that he was "legally entitled to recover" against Tortfeasor. *Id.* at 716-18; *Edwards*, 574 S.W.2d at 508. Since Plaintiff brought this suit on the insurance contract in less than ten years after the accident, the suit was not time-barred by the applicable statute (§ 516.110).

Similarly in this case, to the extent the civil action statute of limitations has run on Ms. Johnson's debt, the statute of limitations is merely a procedural bar to MGE filing a civil law suit against Ms. Johnson. It does not change the fact that Ms. Johnson owes MGE money for services it has provided to her and thus has a delinquent utility charge for services provided by MGE.

USE OF A CIVIL ACTION LIMITATION
IS INCONSISTENT WITH COMMISSION RULES

Staff's argument is further flawed in that it would serve to make nonsensical a portion of the very Commission rule at issue. Commission Rule 4 CSR 240-13.035 (Denial of Service) has separate provisions for those persons with unpaid accounts in their name (4 CSR 240-13.035(1)(A)) and those persons who have received the benefit of use related to unpaid accounts that were not in their name (4 CSR 240-13.035(2)(B)). In the latter case, Commission rule provides that the bill at issue must have been "incurred within the last seven (7) years." Commission Rule 4 CSR 240-13.035(2)(B)2. No such limitation is placed on the debts of the account holder.

The use of the seven year limitation as to denial of service where there are unpaid accounts for which the applicant had the "benefit of use," as opposed to there being no such limitation when an applicant has a debt related to an account in their own name, was a conscious decision by the Commission. The Commission's Order of Rulemaking in Case No. AX-2003-0574 (*In the Matter of a Proposed Denial of Service Rule*, issued March 18, 2004) contains a "Comment" and "Response and Explanation of Change" related to the Commission's decision to change the benefit of use time limit from the five years reflected in the proposed rule to the seven years reflected in the Order of Rulemaking. *Id*. p. 9.

The Comment, among other things, reflects that "Staff commented that the requirement that the bill has been incurred in the past five (5) years only applies when an applicant is being asked to pay the bill of another customer in order to receive service." The Commission, in response, stated that "in an attempt to balance the needs of individual customers to receive service and the needs of all customers not to have increased bad debt expense, the Commission has changed the requirement to seven (7) years." Certainly the Commission, and the Staff for that matter, did not believe that there was any civil statute of limitations applicability to the denial of service issue, nor did the Commission otherwise impose a time limitation for those persons with acknowledged, unpaid accounts in their own name.

If utility debts have no import after five years, as alleged by the Staff, the seven year limitation for those that have had the benefit of use makes no sense. The existence of this provision cannot be resolved with the Staff's position in this case.

Further, the distinction between civil statutes of limitation and Commission rules has been recognized by the Commission itself. In addressing the appropriateness of a Staff proposed limitation on a utility's collection of undercharges, the Commission stated as follows:

> The Commission in so finding rejects Company's reasoning that a statute of limitation and billing adjustment period are synonymous. The billing adjustment period is found to act as a part of the regulatory contract that establishes and allows for the cause of action. Viewed in this way the billing adjustment period is deemed to have a legal purpose separate and apart from the statute of limitation period as set by the General Assembly.

In the Matter of United Cities Gas Company's Proposed Tariffs, MoPSC Case No. GR-93-47, 3 Mo. P.S.C.3d 280, 287 (1993).

Similarly, in this case, the Commission's rule and MGE's tariff provide that MGE is not required to initiate new service to those persons that have shown an unwillingness or inability to pay for past service. These rules operate to the advantage and protection of both MGE and its paying customers. This is a legal purpose separate and apart from the applicable civil statute of limitations. It is also something that is within the Commission's jurisdiction. "The power [of the commission] 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." *A.C. Jacobs & Co. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo.App.W.D. 2000), citing *State of Missouri, ex rel. Western Union Telegraph Company v. Public Service Commission*, 304 Mo. 505, 264 S.W. 669, 672 (Mo. banc 1924).

The Commission rule and MGE tariff which allow MGE to deny service to persons with a delinquent utility charge for services provided by MGE contain no time limitation on the delinquent utility charge and are not limited by the statutes of limitation found in Chapter 516 of the Revised Statutes of Missouri.

WHAT CIVIL STATUTE OF LIMITATIONS IS APPLICABLE?

Staff's argument necessarily assumes that the five-year statute of limitations (Section 516.120, RSMo), rather than the ten-year statute of limitations (Section 516.110, RSMo) applies to Ms. Johnson's debt. Although it is irrelevant to the present action, MGE would argue that the

ten-year civil statute of limitations would apply to any civil action it could file against Ms. Johnson.

The five-year statute of limitations, in relevant part, applies to "[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record and except where a different time is herein limited." Section 516.120.1, RSMo. The ten-year statute of limitations applies, in relevant part, to "[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property." Section 516.110.1, RSMo.

The five-year versus ten-year question turns on whether or not the relationship between the customer and the utility is viewed as one based upon a writing. The business relationship between a utility and its customers is rooted in contract. *National Food Stores, Inc. v. Union Electric Company*, 494 S.W.2d 379, 381 (Mo. App. 1973). The tariff sheets are a part of the regulatory contract between MGE and its customers. *See A.C. Jacobs & Co. v. Union Elec. Co.*, 17 S.W.3d 579, 585 (Mo.App.W.D. 2000). Thus, there is a writing.

"'For a claim to fall within Section 516.110(1) "it must appear that the money sued for is promised by the language of the writing. The promise must be contained within the writing and may not be shown by extrinsic evidence or consist of an obligation imposed by law from the facts.' However, the promise need not be stated in express terms so long as 'the language of the writing, by fair implication, is open to the construction that it contains such a promise.' Once the plaintiff establishes the fact of a promise, the plaintiff may use extrinsic evidence to show other details, including the exact amount due." *Collins v. Narup*, 57 S.W.3d 872, 874 (Mo.App.E.D. 2001) (citations omitted).

In *Collins*, a patient signed a document stating "I understand and agree…that I am personally responsible for payment of all services rendered to me." The Court found that "as a result, the patient acknowledged a specific indebtedness when he signed the guaranty. *Id*. 752 S.W.2d at 482-83 & n.3. The court was not concerned whether the ultimate amount to be paid was conditional or was to be ascertained in the future. *Id*. It was enough that the patient's promise to pay for his medical services appeared on the face of the agreement, so that no extrinsic evidence was necessary to ascertain the fact of the promise." *Collins* at 874. "The fact that the amount to be paid is conditional or is to be ascertained in the future does not remove the document from the operation of the ten-year statute." *Id*. at 875. The Court therefore found in Collins that the ten year statute applied.

This is similar to the relationship Ms. Johnson agreed to when she became a customer of MGE. She agreed to pay for the natural gas services to be provided to her, although the amount of those payments would be ascertained in the future. The ten-year state of limitations should therefore be applicable to Ms. Johnson's debt and even under Staff's theory, Ms. Johnson continues to have a delinquent utility charge and MGE is not required to initiate service to her.

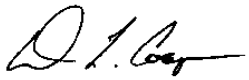
CONCLUSION

Staff's last-minute argument to impose a civil action statute of limitations into this matter is unwarranted. Civil statutes of limitations only serve as a procedural bar for civil actions and do not impact a substantive issue, such as whether an outstanding debt is owed. Further, imposing a five-year civil limitation is inconsistent with Commission rules. Throughout these proceedings, until the moment of the hearing, Staff had taken the position that Ms. Johnson owed a debt to MGE and that MGE had acted in accordance with its tariffs and Commission rules.

Staff's attempt to apply an inapplicable, unrelated civil statute of limitations at hearing provides neither clarity nor consistency to the regulatory process.

WHEREFORE, MGE respectfully requests that the Commission consider this brief and, thereafter, issue such orders as the Commission believes to be reasonable and just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on September 26, 2008, to the following:

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