BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

Licata, Inc., a Missouri corporation d/b/a Heart Mobile Village, Complainant, vs. The Kansas Power and Light Company, a Kansas corporation d/b/a KPL Gas Service, Respondent.	)	CASE NO. GC-88-233

APPEARANCES: Jeremiah D. Finnegan, Attorney at Law, 4049 Pennsylvania, Suite 300, Kansas City, Missouri 64111, for the Complainant, Licata, Inc.

Martin J. Bregman, Assistant General Counsel - Regulatory Affairs, The Kansas Power and Light Company, P. O. Box 889, 818 Kansas Avenue, Topeka, Kansas 66601, for Respondent.

Douglas C. Walther, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

HEARING EXAMINER: C. Gene Fee

REPORT AND ORDER

On March 28, 1988, the instant complaint was filed by Licata, Inc., (Licata or Complainant) doing business as Heart Mobile Village, against The Kansas Power and Light Company (KPL or Respondent). By an Order and Notice of Hearing dated May 11, 1988, the Commission denied KPL's Motion To Dismiss and set the case for hearing concerning "the factual issue...as to whether or not Respondent has improperly denied service to Complainant under a filed rate." Prior to the hearing the parties agreed

upon a Stipulation Of Facts and requested the issues to be determined upon the stipulation and briefs.

Complainant and Respondent have filed simultaneous initial briefs and simultaneous reply briefs in completion of the record in this matter.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

The parties have waived an evidentiary presentation and submitted the following Stipulation of Facts. Because of their volume, six exhibits referred to in the Stipulation are not attached to this Report and Order.

STIPULATION OF FACTS

The parties stipulate to the accuracy of the following statements of fact:

1. Complainant is a Missouri corporation doing business as Heart Mobile Village in Kansas City, Jackson County, Missouri, and operating a mobile home court consisting of approximately 425 mobile homes and their occupants at 7000 E. Highway 40 in Kansas City, Jackson County, Missouri.

2. Respondent is a Kansas corporation engaged in the business of providing natural gas service in the State of Missouri, including Kansas City, Jackson County, Missouri, and is a natural gas public utility operating within the State of Missouri under Chapters 386 and 393, R.S.Mo. Supp. Its principal place of business is located at 818 Kansas Avenue, Topeka, Kansas.

3. In December, 1987, and January, 1988, Complainant installed at its mobile home court an LP Gas storage and aeration system capable of providing the entire gas requirements of its mobile home court and permitting it to utilize either an LP Gas/air mixture or natural gas in its existing gas distribution system.

4. That Complainant is capable of taking natural gas on an interruptible basis and has been capable of doing so since the LP Gas/air system became operational. However, as presently engineered, Complainant's system would not meet KPL's requirements for a direct-fueled facility due to the lack of a three-way valve connection, that is, a connection which would preclude the introduction of both natural gas and the LP Gas/air mixture into the system at the same time.

5. Prior to the installation of the LP gas storage and aeration system, Complainant was a master-meter mobile home court customer of KPL. During the most recent twelve month period deliveries of natural gas to

Complainant through KPL's master meter exceeded 3,000 Mcf in at least one month.

6. On or about February 2, 1988, Complainant through its attorney, Jeremiah D. Finnegan, wrote Respondent requesting that Respondent send the forms and information necessary to enter into a contract with KPL Gas Service for Large Commercial Service. A copy of such letter is attached hereto as "Exhibit 1."

7. In such letter of February 2, 1988, Complainant also renewed its request of June 19, 1987, that KPL Gas Service enter into a contract with Complainant for the transportation of natural gas. A copy of such letter dated June 19, 1987, is attached hereto as "Exhibit 2."

8. By letter dated February 11, 1988, Complainant was notified by Respondent's attorney, Martin J. Bregman, that it was denying Complainant's request for service under its Large Commercial Service tariff basing such denial on the grounds that it can only serve Licata, Inc., under "Article 10. Mobile Home Service" of its General Terms and Conditions For Gas Service tariffs. A copy of such letter is attached hereto as "Exhibit 3."

9. Respondent had previously, by letter of July 6, 1987, denied Complainant's request for transportation of natural gas under its Commercial Gas Transportation Service tariffs for the same reason, i.e., its claim that the Mobile Home Service tariffs applied. A copy of such letter of July 6, 1987, is attached hereto as "Exhibit 4."

10. Service to Complainant was terminated on April 18, 1988. Since that date, all of Complainant's requirements for gas service have been supplied by the LP gas storage and aeration system.

11. If KPL-owned submeters were installed at all points of consumption in Complainant's mobile home court, while natural gas in excess of 3,000 Mcf in at least one month of a twelve month period would still register on Complainant's master meter, KPL would submit individual bills to those persons receiving service through the submeters and Complainant would only be responsible for the difference between the total of the submeter readings and the master meter reading. In that event, no single location, including the master meter, would have consumption of natural gas in excess of 3,000 Mcf in any single month. KPL has surveyed Complainant's gas distribution system and has concluded that it cannot, consistent with its standard practices and procedures, install submeters on Complainant's system as it is currently constituted.

12. Complainant, however, does not desire and is not seeking to have KPL submeters installed. Complainant proposes to receive natural gas, whether that of KPL or its own transported by KPL, through a master meter and to supply same to its tenants through its own distribution system and Complainant-owned submeters at each tenant location. In that event a single location, the master meter, would have consumption of natural gas in excess of 3,000 Mcf in at least one month of a twelve month period.

13. "Exhibit 5" hereto is a full and complete copy of Respondent's Large Commercial Service (LCm) and Interim Large Commercial Transportation (LCTm) tariffs on file with the Missouri Public Service Commission.

14. "Exhibit 6" hereto is a full and complete copy of Article 10 of General Terms and Conditions on file with the Missouri Public Service Commission.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions:

The issue for determination in this matter is which of KPL's filed rates are applicable to service rendered to Licata. It is Licata's contention that the applicable tariff is the Company's Large Commercial Service (LCm) or the Large Commercial Transportation (LCTm) tariff. It is KPL's contention that the proper tariff is Article 10 of its General Terms and Conditions (GT&C) which applies specifically to mobile home courts.

Licata concedes that it is not in compliance with Article 10 and does not intend to come into compliance with Article 10 because it is invalid and unconstitutional.

KPL's brief recalls the history of Article 10 of its General Terms and Conditions. Article 10 in its present form was approved by this Commission in Case No. GR-84-263. By Report and Order effective May 14, 1985, 27 Mo. P.S.C. (N.S.) 343, the Commission approved the present Article 10 which provides that in mobile home courts in which gas service was established prior to May 14, 1985, company-owned submeters are to be installed and individual bills submitted to those persons receiving service through the submeters. In cases in which a master meter remains and gas flows to end users through a system owned by the mobile home court, a bill is also to be rendered to the master meter customer for the difference between the total of the submeter readings and the master reading. In Case No. GR-84-263 the Commission found, after notice of hearing to all affected mobile home courts owners, that the repiping of mobile home courts and the elimination of master metering would eliminate potential safety problems and would be in the public interest. The

Commission also found, at page 349, that it was reasonable for the company to install submeters at master metered courts, and that such a provision would afford the mobile home tenants with the Commission protection with respect to rates and billing practices. Potential problems with respect to resale of gas were expected to be eliminated once company-owned submeters were in place.

The briefs of Complainant address other issues not embraced in the instant complaint as filed and may not be referred to at great length in this order.

Licata contends that Article 10 is invalid because it violates the common law duty of a public utility to provide adequate service without unjust discrimination as codified in Section 393.130, RSMo., Supp. In support of that contention Applicant cites State ex rel. Laundry, Inc., v. Public Service Commission, 34 S.W.2d 37, 45 (1931) and State ex rel. Overman v. Southwestern Bell Telephone Company, 675 S.W.2d 419, 424 (Mo.App. 1984). Overman was a suit for damages against Southwestern Bell Telephone Company and the specific question being addressed was whether or not punitive damages would be appropriate. The Commission is of the opinion that the case is not helpful in disposing of any issues in the instant case. In Laundry the court stated, at page 44:

> "but we still understand to be the prevailing rule; Accordingly, even at common law, it is not admissible for a public service company to demand a different rate, charge or hire from various persons for an identical kind of service under identical conditions. (Emphasis supplied).

In the instant case the Complainant contends in its brief that the subject rule is only applicable to mobile court owners and not to others such as apartment owners and shopping center owners, whose gas usage is similar to that of mobile home courts. As such, Complainant contends that application of the rule is clearly undue discrimination. As pointed out in the Respondent's reply brief, the nature of such customers as apartment buildings and shopping centers and the manner in which they are treated by KPL in its tariffs and GT&C are factual issues. The Complainant has

failed to show that service to mobile home courts, shopping centers, or apartment buildings, are either similar or dissimilar.

In its brief Licata raises for the first time the contention that Article 10 is invalid for several constitutional deficiencies. Licata contends that Article 10 is unconstitutional because it would take property without due process of law in contravention of the Constitution of the United States, Amendment XIV, Section 1 and the Constitution of Missouri, Article 1, Section 10 and Section 26 and because it impairs the obligation of contracts between Licata and its tenants in contravention of the Constitution of the United States, Article (number omitted in brief), Section 10, Sub. 1 and Constitution of Missouri, Article 1, Section 13. Article 10 is also attacked as being a denial of equal protection of the laws as guaranteed by the Constitution of the United States, Amendment XIV, Section 1 and the Constitution of Missouri, Article 1, Section 2.

Even if this Commission were empowered to determine constitutional issues, which we doubt, the record is also silent as to any evidence on which to base the alleged infirmities. As an example, there is no evidence of the existence of any contract requiring Licata to furnish gas to its tenants. As in all complaints, the burden of proof is upon the complainant and the record is simply silent in the areas that would support the requisite findings.

In its reply brief Complainant cites in McIntosh v. City of Joplin, 486 S.W.2d 287 (Mo.App. 1972) for the proposition that the Company's action constitutes taking private property without compensation. In the Commission's opinion McIntosh is distinguishable in that it involves a city connecting its district sewer system to a private sewer system over the objection of the owner of the private system. In the instant case Complainant is voluntarily seeking a customer relationship with the Respondent and must take the service subject to the conditions of the tariff applicable to all other similar customers.

Contentions that the action contemplated by the Commission approved tariff in Article 10 constitutes confiscation is a new issue not raised prior to the filing of the Complainant's brief. As such, the Commission could determine it unnecessary to consider the issues. Instead, we choose to address the question on its merits since the Respondent has addressed the questions substantively in its reply brief. The Respondent cites authority for the proposition that restriction or the denial of use of property by state action is permissible under the police power if necessary to promote public health and safety. In Deimeke v. State Highway Commission, 444 S.W.2d 480, 482-83 (Mo. 1969), that justification was even extended for aesthetic reasons. Article 10 promotes the public safety, as found by the Commission in Case No. GR-84-263. Its enforcement, therefore, is pursuant to the legitimate police powers of the State and does not constitute an unconstitutional confiscation.

Article 10 is also claimed to be unlawful because it requires Licata to make improvements to its distribution system at its own expense; install meter sets at its own expense in order to permit KPL to install KPL submeters to each tenant of the mobile home court and bill them for gas service directly; and prohibit the resale of gas by such mobile home court owner to its tenants as a condition for continued service. It is claimed that such requirements are unreasonable because they are an attempt to extend by a utility tariff the regulation of a legitimate business not subject to Commission jurisdiction. If that were true, the same would be true in any instance wherein the Commission has approved a tariff which establishes the terms and conditions under which a customer may receive service from a utility. We are of the opinion that such an action does not extend regulation to any person not subject to Commission jurisdiction. Article 10 merely establishes reasonable terms and conditions for the provision of utility service to mobile home parks, promoting the laudable goals of public safety and ratepayer equity.

We would also like to recall our position in Case No. GR-84-263 in response to the intervenor mobile home court's contention that the Commission has no

jurisdiction over court-owned gas distribution systems. We were of the opinion then, and we are of the opinion now, that Section 393.140 (11), RSMo 1986, gives the Commission authority to approve rules and regulations of gas corporations which control the manner in which service is rendered by the company and set forth conditions under which service may be taken.

There is no evidence in the instant record that Article 10 is being applied to Licata in any manner different from its application to all other mobile home courts in the Company's service area. The Commission is still of the opinion that the goals sought in Case No. GR-84-263 are desirable and should be applied uniformly. The evidence in that case established the number of master metered mobile home courts in the Company's service area not having company-owned submeters to be approximately 80. As previously stated, there is no evidence in this record to determine that Licata's service, or any other mobile home court service, is sufficiently similar to apartments or shopping centers to justify service under the LCm rate. There is no possibility of a finding that Article 10, applying specifically to mobile home courts, is not the proper and applicable tariff.

Complainant contends that he is entitled to transportation service under the LCTm whether or not Article 10 is invalid. In the Commission's opinion this contention cannot be defended. We have previously stated why we believe that Article 10 is the appropriate tariff and why the LCm is not the appropriate rate. As pointed out in the Complainant's brief, the availability provision of the LCTm tariff at P.S.C. Mo. No. 1, 2nd Revised Sheet No. 46, makes the rate available for those customers who qualify as Large Commercial customers. It reads in pertinent part as follows:

> "...this rate is applicable to natural gas transportation service supplied at one point of delivery to customers served under Company's gas rate schedule for Large Commercial Service."

Since Complainant's contention that it is receiving service identical to others in the Large Commercial Class cannot be supported by the instant record, the

foundation of the applicability of the transportation service is lacking. The entire reasoning in the Complainant's brief concerning the transportation issue, although somewhat circular in nature, is founded on the assumption that Complainant qualifies as a Large Commercial Service customer. Since the instant record fails to support any inference that Complainant should be treated any differently from the many other mobile home court customers of the Company, the assumption for eligibility for the Large Commercial Service must fail. In reality the Complainant is seeking preferential treatment not extended to other mobile home courts similarly situated.

Licata's brief also contends that the Commission's action amounts to attributing the status of a public utility to Licata. In our opinion, such a contention is beyond the scope of the complaint since at no time prior to the filing of the briefs was there any mention of any attempt to classify Licata as a public utility. It should also be borne in mind that this issue has been created by the Complainant.

The tariff under attack (Article 10) was approved for safety reasons. Since we are of the opinion that the Complainant has failed to sustain its burden of proof that the tariff is unlawful or unreasonable, we are of the opinion that the instant complaint should be dismissed.

It is, therefore,

ORDERED: 1. That the complaint of Licata, Inc., a Missouri corporation d/b/a Heart Mobile Village filed against The Kansas Power and Light Company on March 28, 1988, be, and is, hereby dismissed.

ORDERED: 2. That this Report and Order shall become effective on the 26th day of September, 1988.

BY THE COMMISSION

Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Musgrave, Mueller,
and Fischer, CC., Concur.
Hendren, C., Absent.

Dated at Jefferson City, Missouri,
this 26th day of August, 1988.