BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. GC-2011-0100
Missouri Gas Energy, a Division of Southern Union Company	)	
Respondent.	)	

REPLY OF MISSOURI GAS ENERGY TO STAFF'S SUGGESTIONS IN OPPOSITION TO MGE'S MOTION FOR SUMMARY DETERMINATION

COMES NOW Respondent Missouri Gas Energy ("MGE") and for its reply to Staff's Suggestions in Opposition to MGE's Motion for Summary Determination ("Motion"), states the following:

INTRODUCTORY OBSERVATIONS

Although MGE has requested summary relief based on a number of legal and procedural principles such as standing, Missouri's Ripeness Doctrine and collateral attack on an approved tariff, these matters are all interrelated facets of one, overarching concept. The common element here is that there is no actual, live dispute presented so, practically and legally speaking, there is no action the Commission can or should take at this time. Staff has made a selective attack on one utility's validly-approved tariff – a tariff with sections that have been in effect for several years – with no pending dispute other than Staff's flawed interpretation of the tariff language as it relates to the Commission's natural gas safety rules. In the end, Staff has failed to convincingly allege or prove that MGE's application of its Tariff Sheet R-34 violates any statute, rule, order or decision of the Commission. As such, the Complaint should be dismissed.

The most telling aspect about Staff's Suggestions is that they do not directly address the arguments contained in MGE's Memorandum of Law filed in support of its Motion for Summary Determination. To illustrate, MGE provided a detailed explanation why Staff's interpretation of the disputed tariff language is simply incorrect.[1] MGE explained that there is no conflict between the Commission's natural gas safety rules and Tariff Sheet R-34. MGE pointed out that the tariff addresses the duty to warn of *potential* hazards whereas the regulations address the company's obligation to warn of *actual* hazards that might exist at the time MGE turns on the flow of gas to new fuel line installations under 4 CSR 240-40.030 (10)(J) or when MGE turns on the flow of gas to a customer under 4 CSR 240-40.030 (12)(S). While MGE has an obligation to comply with the terms of subsections (10)(J) and (12)(S) with respect to any actual hazards that exist at the time MGE engages in activities covered by such regulations, the third paragraph of Tariff Sheet R-34 is expressly limited to hazards that are, at the time gas is turned on, only potential hazards, ("...Company shall owe customer no duty to warn of potential hazards that may exist...") such as equipment or piping that might later fail, malfunction, or fall into disrepair (hazards which, in MGE's view, could require any number of speculative or remote warnings during each service visit). Staff says *nothing* about MGE's points on this topic in its Response. This silence on the part of Staff should be taken as Staff's acknowledgement that it has no meaningful response and, consequently, has conceded MGE's point that MGE's tariff is in no way incompatible with the Commission's natural gas safety rules.

BACKGROUND AND SUMMARY OF REPLY

On April 11, 2011, MGE filed its Motion for Summary Determination (the "Motion") in the captioned matter in accordance with Commission Rule 4 CSR 2.117(1).

[1] *See*, MGE's Memorandum of Law, p. 3, ftnt. no. 2.

Staff filed its Response and Suggestions in Opposition to MGE's Motion on May 18, 2011.[2]

The response filed by Staff does not provide any principled or fact-based grounds for the Commission to conclude anything except that MGE is entitled to relief as a matter of law. Staff's filing is a compilation of strained rationalizations that draw on unrelated events and fundamental misconceptions about the law and MGE's tariff. In one notable circumstance, the case law cited by Staff actually supports MGE's Motion. The Staff's Complaint should be dismissed.

ARGUMENT

Staff Does Not Dispute Any of the Fact Allegations in MGE's Motion

Staff's Response admits each and every allegation of material fact set forth in MGE's Motion. Consequently, the facts as alleged by MGE are not in dispute and are to be taken as true for purposes of the Commission's ruling on MGE's Motion.

The Commission should note, however, that Staff has attempted a sleight–of-hand at page 2 of its Suggestions stating that "[T]he parties agree that no material fact remains for hearing." It is true that Staff has admitted MGE's fact allegations. On the other hand, MGE has disputed a number of the fact allegations set forth in Staff's Motion for Summary Disposition, particularly with respect to Staff's interpretation of MGE's validly-approved tariff. The cross motions filed by Staff and MGE do not allege or rely on identical facts and the parties' responses are not, therefore, interchangeable. Each must be evaluated individually and independently. As such, Staff is wrong to imply that no hearing would be required with respect to Staff's Motion for Summary Determination simply because it has admitted MGE's allegations of material fact.

[2] EFIS document 29.

Standing and Ripeness

Staff must allege a violation of a statute, rule, order or decision of the Commission by MGE to have standing to file its Complaint. Staff has not done so and, consequently, its Complaint is not authorized. Absent standing to file the Complaint, it must be dismissed and no further findings by the Commission are necessary or appropriate. Additionally, there is no case or controversy presented by the Complaint and, consequently, the matter is not ripe for decision. Staff's position is at odds with controlling case law that states there must be an actual, live dispute for the Commission to issue a report and order.

At page 7 of its Suggestions, Staff disputes MGE's claim that Staff has no standing to file the Complaint pursuant to Commission Rule 4 CSR 240-2.070(1). Staff argues that the phrase "who feels aggrieved by a violation of the statute, rule, order or decision within the Commission's jurisdiction" does not apply to Staff and, consequently, Staff has the authority to file a complaint even in the absence of an allegation of wrongful or inappropriate conduct. This interpretation of the Commission's complaint rule leads to a strange and unreasonable result.

It is apparent that Commission's complaint rule requires that persons or public utilities must allege that they are aggrieved by a violation of a statute, rule, order or decision of the Commission on the part of a respondent. MGE has not argued (and does not here argue) that Staff must claim to be aggrieved by any action allegedly taken by MGE. MGE simply contends that any complainant must allege some action taken by the respondent that is in violation of a statute, rule, order or decision of the Commission. Otherwise, the Commission has no jurisdiction to hear a complaint. *See*, §393.140(5) RSMo. Significantly, Staff has not alleged that MGE has applied its Tariff Sheet R-34 in a manner that is unjust or unreasonable.

Recognizing that the logical consequence of its argument is indefensible, Staff posits a violation of elements of the Commission's natural gas safety rules on the part of MGE.[3] This allegation has no merit. No specific conduct on the part of MGE that might constitute a violation of those rules has been alleged by Staff. MGE does not dispute that it is subject to the Commission's natural gas safety rules. Staff has made no assertion, nor any showing that MGE has somehow ignored the natural gas safety rules since Tariff Sheet R-34 became effective in 2007. Staff has not asserted that MGE has disregarded its obligations under any gas safety regulation or that MGE has stopped warning of actual safety hazards that exist when MGE turns on the flow of gas under (10)(J) or (12)(S). The Complaint simply does not present any alleged violation of the Commission's natural gas safety rules.

MGE's Tariff Sheet R-34 does not conflict with the Commission's natural gas safety rule in any fashion. If fact, they each deal with different matters altogether. The relevant subsections of the Commission's natural gas safety rules require that LDCs like MGE conduct a limited visual inspection of exposed and accessible customer-owned piping and connected equipment prior to starting the flow of gas and that it warn of *actual* hazards. The terms of MGE's Tariff Sheet R-34 do not purport to relieve MGE of the requirement to perform this limited visual inspection. To the contrary, the tariff addresses the duty to warn of *potential* hazards and the implications for the company's civil liability (which, as noted above, could comprise of any number of speculative or remote potential hazards during each service visit). The two concepts do not conflict in any fashion. They operate wholly independently and harmoniously.

[3] 4 CSR 240-40.030(10)(J) and (12)(S).

Not deterred by a lack of facts, Staff audaciously contends that there is no "ripeness" or "case or controversy" requirement in §393.140(5) RSMo. This is simply wrong. Missouri's Ripeness Doctrine requires that there be an actual case or controversy before determining the legal rights of parties. This is a judicial construct to provide for procedural economy and to avoid the necessity of deciding matters that are not actually in dispute.[4] As such, explicit references to Missouri's Ripeness Doctrine do not appear in the statutes giving rise to civil or administrative actions, but the requirement exists nonetheless.

In its Memorandum of Law, MGE cited the Commission to *State ex rel. Kansas Power and Light Company*, 770 S.W.2d 740 (Mo. App. 1989). The Court in that case extended the requirement that a controversy be ripe for adjudication to proceedings of the Commission. Ironically, it was the Commission in the *KPL* case that argued to the Western District Court of Appeals that its own Report and Order was not reviewable by a court because it did not purport to resolve an actual dispute. *Id.* at 742. The Court agreed with the Commission stating that "The Report and Order should not have been promulgated as an order when it did not address a live dispute." *Id.* It is therefore perplexing to hear Staff dispute the existence of the requirement that a controversy be ripe for adjudication in Commission cases.

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[4] "The basic rationale of the ripeness doctrine is to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, 26 (Mo. banc 2003) (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148-9, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

Staff attempts to distinguish the *KPL* circumstances from those presented in this case, but the distinctions offered are meaningless. As in the *KPL* case, there is no live dispute here.[5] In essence, Staff argues that if MGE were to perform a visual inspection of exposed and accessible customer-owned piping and connected equipment prior to commencing service at a customer's residence, and that if there were a subsequent event resulting in damage to person or property related to the operation of natural gas piping or equipment, and that if the customer subsequently sued MGE in circuit court for negligent conduct concerning a *potential* hazard, and that if MGE were to assert full or partial immunity from civil liability based on the tariff language, and that if a court of law were to apply the tariff language limiting MGE's civil liability related to said incident, that this speculative scenario would be detrimental to the public interest.

The hypothetical offered by Staff falls far short of the requirement that there be immediacy to any claimed dispute. Even the probability that an event will occur does not present a controversy that is ripe for adjudication.[6] In the end, Staff's Complaint is no more than a request for "a determination by the Commission of pure legal questions divorced from any application to a set of facts." *KPL* at 742.

At page 11 of its Suggestions, Staff asserts that there is civil litigation pending in the Circuit Court of Jackson County, Missouri between MGE and Trigen-Kansas City Energy Company[7] and claims that lawsuit satisfies the case or controversy requirement. This circumstance is wholly irrelevant to the matter at hand because the litigation with Trigen is not a dispute that the Commission has been called upon to resolve. Moreover, the issue in that case relates to a programming error caused by a gas metering

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[5] In the *KPL* case, the Court observed "[t]here is nothing in the record to indicate that any interstate pipeline company had undertaken to make a direct retail sale of natural gas to any customer." *Id.* at 741. Similarly, there is no showing in this case that MGE has applied the language in its Tariff Sheet R-34 in an unreasonable or inappropriate manner.

[6] *Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983) citing *Lake Carriers Ass'n v. MacMullen*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972).

[7] Case No. 1016-CV24880.

installation and a consequent billing adjustment that MGE contends is authorized by its Tariff Sheet No. 43 (§5.11 "Billing Adjustment"); an entirely different topic. In the Trigen matter, due to a programming error, Trigen was billed for only half of the amount of natural gas that it received over a five-year period, which resulted in Trigen receiving over $3.8 million in free natural gas. While MGE regrets that the programming error occurred, the fact remains that Trigen received the benefit and use of natural gas that it never paid for. MGE's tariffs directly address billing adjustments and permit the Company to recoup undercharges not to exceed sixty consecutive billing periods calculated from the date of discovery.[8] A non-residential customer who was undercharged is permitted to make equal monthly installments over a period not to exceed the period of the billing adjustment. In its response, Staff fails to note that MGE actively sought to have the case dismissed (and likely presented to the Commission for review) by arguing that the Commission had primary jurisdiction and that Trigen had failed to exhaust its administrative remedies in front of the Commission (although MGE actually urged Trigen to file an informal or formal complaint). MGE's relationship with Trigen is governed by its tariffs and there is a billing adjustment tariff directly on point. MGE's motion to dismiss on those bases was rejected by the trial court and was subsequently appealed (unsuccessfully) by MGE to both the Western District Court of Appeals and the Missouri Supreme Court. Trigen's assertion that it was somehow damaged by receiving free natural gas is, to put it mildly, unclear to MGE and is subject to pending litigation at the early stages of discovery and depositions.[9] What <u>is</u> clear is

[8] See MGE General Terms and Conditions for Gas Service, Sheet No. R-44. The rules for residential and non-residential customers are different. For residential customers, MGE can make adjustments for 12 months for undercharges and must go back 60 months for overcharges. See Sheet No. R-43. For non-residential customers, like Trigen, overcharges can be adjusted up to 60 months and undercharges may be adjusted for up to 60 months. See Sheet No. R-44.

[9] MGE is at a loss to understand how the Staff General Counsel could at page 14 of the Suggestions purport to characterize Trigen's lawsuit as "reasonable" in light of the controlling, Commission-approved tariff language and case law giving the Commission primary jurisdiction

that the Trigen litigation has nothing to do with Staff's assertions as to this tariff's applicability to natural gas safety rules. Staff's attempts to draw a link between the Trigen litigation and Staff's arguments against a validly approved limitation of liability tariff must fail.

Staff argues that a report and order in this case would affect the rights of MGE[10], but by that standard, someone's interest would be impacted by <u>any</u> abstract pronouncement of the Commission. In the *KPL* case, the rights of interstate natural gas pipelines making direct sales to local customers could be said to be affected. The fact that someone was not identified by name is inconsequential. The point of the *KPL* case, of course, is that there must be an actual scenario of an interstate natural gas pipeline company making direct sales to an identifiable person and an effort on the part of the Commission to impose penalties and/or enjoin operations in order for there to be a controversy that justifies an exercise of regulatory power. The *KPL* case and Staff's Complaint against MGE are indistinguishable in that they both deal with general legal/policy pronouncements without the benefit of an actual, underlying dispute.

<u>Collateral Attack and Presumptive Validity</u>

The Complaint is also deficient in that it represents a collateral attack on a prior order in Case No. GR-2006-0422[11] and MGE's Tariff Sheet R-34 enjoys the statutory presumption of reasonableness embodied in §386.270 RSMo. Staff admits that its Complaint is a "direct attack" on MGE's Tariff Sheet R-34, thus admitting the Complaint is prohibited, and also fails to concede that the Commission-approved tariff is deemed reasonable. In any event, Staff fails to offer any convincing rationale for rebutting the tariff's presumptive reasonableness.

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over the dispute. Unauthorized pronouncements about the merits about a lawsuit between private parties are beyond Staff's authority, may be prejudicial and could interfere with the proper exercise of the Commission's statutory powers.

[10] Suggestions at p. 13.

[11] *See*, §386.550 RSMo.

Commencing on page 5 of its Suggestions, Staff asserts that its Complaint is not barred by §386.550 RSMo which provides that "[i]n all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive." Staff claims that its challenge to the Commission-authorized Tariff Sheet R-34 is a "direct attack" on the tariff sheet - not a collateral attack – but this distinction does not improve its legal position.

The question is not, as Staff seems to think, whether a challenge to the language of an order or rule comes up as the principal object of a proceeding or as one of many issues in a larger case. Rather, the question is simply whether the complaining party is challenging the language of the rule or regulation in question in a case other than the proceeding that gave rise to the rule or regulation. Staff openly admits that its Complaint is a "direct attack" on the language of a lawful tariff of MGE other than in the case it was approved (Case No. GR-2006-0422).

Staff cites no compelling legal authority for its novel "direct attack" theory. Furthermore, it ignores recent case law that is at odds with its position. In *State ex rel. Office of Public Counsel v. Public Service Commission*, 307 S.W.3d 556 (Mo. App. 2009), the Court of Appeals stated that if a party is challenging the language of a final rule of the Commission adopted in a prior case, the challenge is not proper. *Id.* at 566. Similarly, a challenge to the language of a regulation approved by the Commission in a prior case is barred.[12]

Staff's strange digression at page 7 of its Suggestions to a discussion of tariffs as "living documents" is not relevant to this analysis. This is an odd and unhelpful concept as an abstract matter. Additionally, it is grounded on case law out of Massachusetts,

[12] "A tariff approved by the Commission has the same force and effect as a statute, and it becomes state law." *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006). *See also, Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997).

New Hampshire, Oklahoma and California, none of which address utility regulation. Rather, the cases address such things as performance evaluations, operating plan guidelines, applications for new drug approval and equipment manufacturer installation, and operation and maintenance manuals. These matters have no apparent commonality with utility tariff sheets. The Commission should dismiss this exposition as a distraction from the matter at hand.

Staff's legal argument commencing on page 3 of its Suggestions challenging MGE's claim of the presumptive reasonableness of its Tariff Sheet R-34 likewise should be disregarded. Staff's counterarguments are based on misconceptions about the law. In fact, the case law cited by Staff actually supports MGE's legal arguments in this case.

Staff asserts that its Complaint in this case is a "suit" brought for the purpose of challenging the regulations embodied in Tariff Sheet R-34 and, consequently, is expressly permitted by §386.270 RSMo. This premise is fundamentally and obviously flawed. Black's Law Dictionary[13] defines a suit as "any proceeding by a party or parties against another in a court of law". This is why they are called lawsuits. The Commission is an executive agency; not a court of law. Staff cites no case law in the State of Missouri likening a complaint filed with the Commission and a lawsuit brought as a civil action before a court of law. As such, Staff's Complaint does not get around the requirement in §386.270 RSMo that a lawfully promulgated regulation can only be challenged through a lawsuit brought for that purpose.

Additionally, Staff puts significant reliance on the Western District Court of Appeals' opinion in *State ex rel. Missouri Pipeline Company v. Missouri Public Service Commission*, 307 S.W.3d 162 (Mo. App. 2009). It is clear from a reading of the language of §386.270 RSMo that what is contemplated is a civil suit brought in a circuit court. The *Missouri Pipeline* opinion refers to the case of *A.C. Jacobs and Company v.*

[13] 9th Ed. 2009.

Union Electric Company, 17 S.W.3d 579 (Mo. App. W.D. 2000) that states "[w]here no lawsuit has been filed challenging the tariff, the General Assembly. . . has mandated that we deem the rights, tolls, charges, schedules and joint rates fixed by the Commission to be lawful and reasonable." (emphasis added) Thus, because no lawsuit challenging the reasonableness of MGE's tariff has been filed, the reasonableness of the tariff is not properly before the Commission.

Even if the Commission were to accept Staff's argument that it is authorized by law to challenge the presumption of reasonableness that has attached to Tariff Sheet R-34, any such challenge must arise in the context of an actual dispute concerning its application. Because the Complaint is premised on hypotheticals and speculation, Staff has not in its Response or supporting Suggestions met its burden. Having failed to overcome the statutory presumption of reasonableness, there is no basis for the Commission to find that Tariff Sheet R-34 is unreasonable as applied.

Not a Rule

Staff's response to MGE's point that the *Laclede* decision is not a general statement of public or regulatory policy because it is not a rule is to admit the point and to offer the dismissive counter-argument "so what?".[14] Setting aside the flippancy of the remark, the point MGE makes is important because, as Staff notes in the immediate following paragraph, the *Laclede* decision was the whole reason Staff brought its Complaint in the first place. Staff has offered the *Laclede* decision as the lynchpin of its Complaint, but it is clear that it was a case decided on its own special facts and has no broader application.[15] Accordingly, it cannot be offered as a general statement of public policy that MGE can be said to have violated.

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[14] Suggestions at p. 10.

[15] Unlike Laclede Gas Company, MGE does not engage in unregulated operations like home inspections or appliance repair and does not sell or install appliances or equipment. (Fact allegations Nos. 5 and 6). Additionally, MGE's tariff was filed with and approved by the

Because the *Laclede* decision is not a rule of general applicability, Staff is pursuing an unfair course of discriminatory enforcement by singling out MGE while conceding the fact that other regulated utilities have Commission-approved limitation of liability tariffs. Staff contemptuously shrugs off MGE's concerns as not worth the effort,[16] but its basis for doing so is anchored in the unexplained statement that other such clauses are, in its opinion, reasonable.[17] But how can some such clauses be reasonable and others unreasonable when Staff has alleged that tariff sheets that limit legal liability violate an overarching public policy of unknown origin? There is a question here of the fundamental fairness of endorsing a policy of selective enforcement. If the question is one that justifies the Commission's attention and time,[18] an *ad hoc* approach to the question is inappropriate.[19]

Neither Unjust Nor Unreasonable

To counter MGE's argument that its Tariff Sheet R-34 is neither unjust or unreasonable as applied, Staff once again refers to litigation occurring in the Circuit Court of Jackson County, Missouri concerning a negligence lawsuit by filed Trigen-Kansas City Energy Corporation against MGE.[20] As noted above, this pending lawsuit has no relevance to the matter before the Commission and, furthermore, Staff's opinion about the merits of the legal arguments being made by the respective parties of that

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Commission in Case No. GR-2006-0422. (Fact allegations 8-15). Laclede's proposed tariff sheet was not approved by the Commission.

[16] *See*, Suggestions, ftnt. no. 36.

[17] Staff also offers the subjective allegation that MGE's tariff is 'the most extreme liability-limiting tariff of all." Suggestions at p. 11. This statement is unsubstantiated and unjustified and should be disregarded.

[18] MGE does not believe that the topic is a wise use of the Commission's scarce resources in light of the Commission's long custom and practice of approving reasonable limitations of liability and, also, judicial recognition of the lawfulness of such clauses as a necessary element of establishing fair and reasonable rates.

[19] Recently, similar concerns caused the Commission to suspend the procedural schedule in Case No. WC-2010-0227 and establish workshop dockets (Case Nos. SW-2011-0236 and WW-2011-0237) in order to address the issues raised by a Staff complaint in a more comprehensive and fair fashion.

[20] Suggestions at p. 13.

litigation are completely inconsequential, unseemly and should be disregarded by the Commission.[21] Although MGE made every effort to get the Trigen litigation in front of the Commission for review, it is now for the Circuit Court of Jackson County, Missouri to decide the rights and obligations of the parties to the Trigen litigation. The Commission should reject the Staff's invitation that the Commission interfere in litigation pending before another tribunal.

The Public Interest

Relying on its previous arguments, Staff insists that allowing the Complaint to go forward is in the public interest. MGE will simply reiterate the obvious point that there is no actual dispute pending before the Commission between MGE and any party claiming to be adversely affected by the Company's application of the language in Tariff Sheet R-34. The fact that there is civil litigation in the Jackson County Circuit Court does not change this analysis, particularly in light of the fact that the issue in that case addresses the application of a different MGE tariff sheet as it bears upon a different subject matter. The facts relevant to that lawsuit are not properly before this Commission for a determination and the Commission would be ill-advised to issue an opinion that would have either the purpose or effect of interfering with the Circuit Court's administration of that lawsuit.

Staff's arguments simply serve to illustrate why it is important that there be an actual case or controversy before the Commission for it to decide. The concerns expressed by Staff cannot be resolved by declarations handed down by the Commission addressing nothing more than conjecture. Rather, the public interest is best served by addressing hard, fact-based situations that call for informed and reasoned decision making.

[21] *See*, ftnt. no. 11, *supra*.

CONCLUSION

MGE has shown that there is no genuine dispute as to the material facts set forth in its Motion. Further, there is no dispute that the Commission has the authority to approve tariff language limiting the liability of public utilities as an aspect of its general ratemaking authority as it did in Case No. GR-2006-0422.[22] Accordingly, the tariff is lawful. Staff has not shown that MGE's Tariff Sheet R-34 is unreasonable as applied by MGE.

Staff does not have standing to bring this Complaint under the Commission's complaint rule because the Complaint does not allege any violation by MGE of a statute, rule, order or decision of the Commission. As such, the Complaint violates Missouri's Ripeness Doctrine in that there is no actual case or controversy and any resultant decision of the Commission will not resolve a live dispute. The Commission has no statutory authority to issue general pronouncements of law or policy. As such, the Complaint should be dismissed.

Also, the Complaint is an impermissible collateral attack on a prior Commission order and a lawful regulation of MGE. The tariff is presumptively reasonable and Staff has not met its burden of showing that the language of the tariff as applied by MGE is unreasonable. Accordingly, the Complaint is prohibited by law.

Finally, the dismissal of the Complaint would be in the public interest. The rights of parties, including MGE, should be determined in the context of an actual dispute. There is no immediate conflict for the Commission to resolve at this time. Should MGE's application of the language in its Tariff Sheet R-34 become the subject of a dispute

[22] The Commission has the authority to approve or reject tariffs limiting liability. The Missouri Supreme Court confirmed this concept in a case concerning telegraph tariffs. *State ex rel. Western Union Telegraph v. Public Service Commission*, 264 S.W. 669 (Mo. 1924). ["The power 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."]

between MGE and any of its customers in a complaint brought for that purpose, the Commission would then have a sound legal basis for exercising its statutory authority. Until then, there is nothing for the Commission to do.

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 transmission to all counsel of record on this 16th day of June 2011.

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