

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service)
Commission,)
)
 Complainant,)
)
 v.)
)
Missouri Gas Energy, a Division of)
Southern Union Company)
)
)
 Respondent.)

Case No. GC-2011-0100

RESPONSE OF MISSOURI GAS ENERGY TO STAFF'S MOTION TO STRIKE

COMES NOW Respondent Missouri Gas Energy ("MGE") and for its Response to Staff's Motion to Strike Insufficient Affirmative Defense ("Motion to Strike"), states as follows:

1. On November 17, 2010, Staff filed a motion to strike paragraph 17 from MGE's Answer alleging that it insufficiently asserts the defense of estoppel. The Motion to Strike should be denied.

**The Motion to Strike is Unauthorized by the Commission's
Rule 4 CSR 240-2.070**

2. The Commission's rule governing complaints (4 CSR 240-2.070) does not authorize the striking of an affirmative defense. Whereas subsection (6) of the rule provides that the Commission "may strike irrelevant allegations" in a complaint, no such provision is included in subsections (7) governing the filing an answer. Subsection (7) provides as follows:

The Respondent shall file an answer to the complaint in the time provided. All grounds of defense, both of law and of fact, shall be raised in the answer. If the Respondent has no information or belief upon the subject sufficient to enable the Respondent to answer an allegation of the complaint, the Respondent may so state in the answer and assert a denial upon that ground. (emphasis added)

There is no authority or precedent for striking affirmative defenses from a pleading that is required by the Commission's rule. Consequently, the Motion to Strike should be denied.

3. Where this topic is concerned, the Commission should apply the maxim of statutory construction known as *expressio unius est exclusio alterius*.¹ Thus, the omission of "may strike" language in subsection (7) of the rule should be understood to exclude the remedy sought by Staff. See, Whitelaw v. Director of Revenue, 73 S.W.3d 731, 734-735 (Mo. App. E.D. 2002); Jantz v. Brewer, 30 S.W.3d 915; 918 (Mo. App. S.D. 2000).

4. To the extent the remedy of striking an allegation in a complaint is also available to strike an allegation contained in an answer, the remedy is only available if the allegation is "irrelevant". Staff has not contended that the affirmative defense of estoppel is irrelevant to the matter at hand.

5. To the contrary, the defense is legitimate because the Commission approved the tariff sheet in question only after Staff filed a recommendation on March 30, 2007, in Case No. GR-2006-0422 that the Commission do so. A copy

¹ Roughly translated, it means the express mention of one thing implies the exclusion of another. It is appropriate to look to this maxim of statutory interpretation in the context of this case in that an agency rule has the force and effect of law. State ex rel. Missouri Gas Energy v. Public Service Commission, 210 S.W.3d 330, 337 (Mo. App. 2006); State ex rel. City of Springfield v. Public Service Commission, 812 S.W.2d 827, 831 (Mo. App. 1991).

of that recommendation is attached hereto. These matters are sufficiently pleaded in the Answer. MGE recites in paragraphs 8 and 15 the Commission's order approving the tariff in 2007 and that order specifically refers to Staff's memorandum of recommendation. In light of this prior action, MGE contends that Staff should not be permitted to contend just several years later that MGE's Tariff Sheet R-34 is unlawful or unreasonable.

The Motion to Strike provides no legal authority for the relief requested

6. Staff's Motion to Strike is further defective because of its exclusive reliance on general case law governing civil practice.² The Complaint before the Commission is not a civil action and, consequently, is not governed by the Rules of Civil Procedure or by the case law governing pleadings practice in civil actions before the judicial branch of government. The Commission is an executive agency.

7. Tellingly, the Motion to Strike contains no reference to any Commission decision or rule supportive of the concepts contained in Staff's argument. Staff does not cite any Commission decision striking an affirmative defense from an answer for insufficiency. The remedy sought by Staff is unprecedented.

WHEREFORE, for the reasons aforesaid, the Staff's Motion to Strike should be denied. In the alternative, the Commission should grant MGE leave to

² Significantly, the Motion to Strike contains no case law reference standing for the proposition that an affirmative defense of estoppel has been stricken by a court by failure to allege specific facts in support of the defense.

amend its Answer to allege additional facts in support of its affirmative defense of estoppel.

Respectfully submitted,

/s/ Paul A. Boudreau
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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 29th day of November, 2010.

Kevin Thompson
Public Service Commission
200 Madison Street
Jefferson City, MO 65102

Robert Berlin
Public Service Commission
200 Madison Street
Jefferson City, MO 65102

Lewis Mills
Office of Public Counsel
200 Madison Street
Jefferson City, MO 65102

/s/ Paul A. Boudreau
Paul A. Boudreau

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the matter of Missouri Gas Energy's)
Increasing Rates for Gas Service Provided)
To Customers in the Company's Missouri)
Service Area)

Case No. GR-2006-0422

STAFF'S RECOMMENDATION

COMES NOW the Staff of the Public Service Commission of Missouri, and respectfully submits as follows:

1. On March 28, 2007, 2004, Missouri Gas Energy, a division of Southern Union Company (MGE) filed tariffs to comply with the Commission's Report and Order (R&O) dated March 22, 2007. MGE has requested expedited approval of these tariffs, to become effective for service on and after April 1, 2007.

2. Staff has reviewed the tariffs, and in its Memorandum attached hereto, recommends that the Commission approve the substitute tariffs as in compliance with the Commission's R&O.

3. Staff also recommends that the tariffs become effective for service on and after April 1, 2007, for good cause shown, pursuant to Section 393.140(11) RSMo 2000.

WHEREFORE Staff recommends that the Commission approve MGE's substitute tariff sheets become effective for service on and after April 1, 2007.

Respectfully submitted,

/s/ Robert V. Franson

Robert V. Franson
Senior Counsel
Missouri Bar No. 34643

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all counsel of record this 30th day of March 2007.

/s/ Robert V. Franson

MEMORANDUM

TO: Missouri Public Service Commission Official Case File,
Case No. GR-2006-0422, File No. YG-2007-0689 Missouri Gas Energy

FROM: Tom Imhoff, Energy Department - Tariffs/Rate Design

/s/ Thomas M. Imhoff 03/30/07 /s/ Robert V. Franson 03/30/07
Energy Department/Date General Counsel's Office/Date

SUBJECT: Staff Recommendation On Missouri Gas Energy's Tariff Sheets Filed to Comply with the
Commission's Report And Order And Motion For Expedited Treatment

DATE: March 30, 2007

On March 22, 2007, the Missouri Public Service Commission (Commission) issued its Report and Order (Order) in Case No. GR-2006-0422. This Order approved a natural gas general rate increase for certain customers of Missouri Gas Energy (MGE or Company).

MGE filed tariff sheets and a Motion For Expedited Treatment (Motion) on March 28, 2007 to comply with the Order. On March 29, 2007, MGE filed substitute tariff sheets that were related to a mathematical error.

In its letters of transmittal accompanying the March 28, 2007 and the substitute March 29, 2007 compliance filings, MGE is requesting an effective date of April 1, 2007, which would be less than the standard 30-day period, but which complies with the effective date of the Commission's Order.

The Commission's Energy Department - Tariffs/Rate Design Staff (Staff) has reviewed each of the tariff sheets, as filed by MGE on March 28, 2007, as substituted on March 29, 2007, and is of the opinion that these sheets are in compliance with the Commission's Order. Staff is also of the opinion that good cause for approval of these tariff sheets on less than thirty days notice is demonstrated by the Commission's Order. Therefore, Staff recommends that the set of tariff sheets designated P.S.C. MO. No. 1, filed on March 28, 2007, and as substituted on March 29, 2007, be approved and to become effective on and after April 1, 2007.

P.S.C. MO. No. 1

Sixth Revised SHEET No. 10, Canceling Fifth Revised SHEET No. 10
Thirteenth Revised SHEET No. 24.3, Canceling Twelfth Revised SHEET No. 24.3
Seventh Revised SHEET No. 25, Canceling Sixth Revised SHEET No. 25
Seventh Revised SHEET No. 28, Canceling Sixth Revised SHEET No. 28
Seventh Revised SHEET No. 31, Canceling Sixth Revised SHEET No. 31
Second Revised SHEET No. 39, Canceling First Revised SHEET No. 39
Fourth Revised SHEET No. 40, Canceling Third Revised SHEET No. 40
Seventh Revised SHEET No. 42, Canceling Sixth Revised SHEET No. 42
Second Revised SHEET No. 61.2, Canceling First Revised SHEET No. 61.2
Seventh Revised SHEET No. 76, Canceling Sixth Revised SHEET No. 76
Sixth Revised SHEET No. 77, Canceling Fifth Revised SHEET No. 77
Third Revised SHEET No. 83, Canceling Second Revised SHEET No. 83
Seventh Revised SHEET No. 94, Canceling Sixth Revised SHEET No. 94
Fifth Revised SHEET No. 96, Canceling Fourth Revised SHEET No. 96
Fourth Revised SHEET No. 97, Canceling Third Revised SHEET No. 97

MO PSC Case No. GR-2006-0422

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Third Revised SHEET No. 98, Canceling Second Revised SHEET No. 98

Fourth Revised SHEET No. R-34, Canceling Third Revised SHEET No. R-34

The Staff has verified that MGE has filed its annual report and is not delinquent on any assessment. Staff is not aware of any other matter before the Commission that affects or is affected by this filing.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

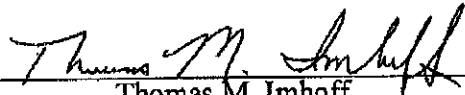
In the matter of Missouri Gas Energy's)
Tariff Sheets Designed to Increase Rates)
for Gas Service in the Company's)
Missouri Service Area.)

Case No. GR-2006-0422

AFFIDAVIT OF THOMAS M. IMHOFF

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

Thomas M. Imhoff, of lawful age, on oath states: that he has participated in the preparation of the foregoing Staff Recommendation in memorandum form, to be presented in the above case; that the information in the Staff Recommendation was given by Missouri Gas Energy; that he has knowledge of the matters set forth in such Staff Recommendation; and that such matters are true to the best of his knowledge and belief.



Thomas M. Imhoff

Subscribed and sworn to before me this 30th day of March, 2007.



SUSAN L. SUNDERMEYER
My Commission Expires
September 21, 2010
Callaway County
Commission #06942086



Notary Public

My commission expires 9-21-10