

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

In the Matter of Southern Union Company,)	Case No. GT-2012-0183
Liability Tariff Filing)	Tariff No. YG-2012-0261

**RESPONSE OF MISSOURI GAS ENERGY IN OPPOSITION TO STAFF'S RECOMMENDATION TO REJECT
PROPOSED COMPLIANCE TARIFF AND PUBLIC COUNSEL'S MOTION TO SUSPEND TARIFF**

COMES NOW Southern Union Company, d/b/a Missouri Gas Energy ("MGE") and for its Response in Opposition to Staff's Recommendation to Reject Proposed Compliance Tariff ("Recommendation") and Public Counsel's Motion to Suspend Tariff ("Motion to Suspend") states the following:

Introduction and Summary

In its November 9, 2011, Final Decision and Order to File a New Tariff Sheet in Case No. GC-2011-0100 ("Final Decision"), the Commission, among other things, directed MGE to file a new tariff sheet that "shall set forth terms of service that are not unjust and unreasonable as set forth in the body of this Order."¹ On December 9, 2011, MGE filed a revised tariff sheet R-34 as directed by the Commission (the "Revised Tariff").² On December 12, 2011, the Commission opened File No. GT-2012-0183 as a repository to receive filings concerning the Revised Tariff (Tariff No. YG-2012-0261). Thereafter on December 19, 2011, the Commission closed File No. GC-2011-0100.

MGE has sought input in endeavoring to implement the Commission's Final Decision. In a November 18, 2011 filing, MGE submitted a revised tariff along with its Application for Rehearing and

¹ Final Decision, p. 27.

² Footnote 5 to the Commission's January 3, 2012 Order Allowing Response to Recommendation and Motion, notes that the pending tariff sheets also include Section 3.20, which relates to the waiver of reconnection fees related to the Joplin tornado. The Commission properly notes that this section is not at issue in File No. GC-2011-0100 or in the present proceeding. Section 3.20, which became effective on June 28, 2011, is only included on Sheet No. R-34.1 because it is currently effective and appears sequentially in MGE's tariff sheets after the last paragraph of Section 3.19 (the Company Liability tariff at issue in this proceeding).

Motion for Clarification, noting that the “language changes illustrated in the attachment [the revised tariff] are calculated to address the Commission’s concerns *as understood by MGE*, but MGE’s understanding may be imperfect.”³ MGE made further efforts to obtain input on its tariff revisions in communication with the Staff.

Nevertheless, MGE only became aware of the concerns with its compliance filing when Staff filed its Recommendation on December 29th. In its Recommendation, Staff asserts that the Revised Tariff does not comply with the Final Decision and, in particular, with the Commission’s findings concerning the first paragraph of MGE’s current Tariff Sheet R-34. OPC’s Motion to Suspend, on the other hand, makes no claim that the Revised Tariff does not conform to the findings in the Commission’s Final Decision and, in fact, only addresses matters that were fully considered by the Commission in its Final Decision. As will be demonstrated herein, the Revised Tariff fully complies with the Commission’s Final Decision and should be approved or permitted to go into effect as filed. It should not be rejected or suspended.

Staff and OPC seek to reargue or litigate matters already decided by the Commission on cross-motions for summary determination or to address matters that are beyond the scope of the Final Decision. As such, those Staff and OPC arguments provide no basis to reject the tariff or suspend its effectiveness.

The Commission Should Reject Staff’s Recommendation.

Staff raises two points in its Recommendation. First, Staff contends that paragraph 1 of the Revised Tariff does not comply with the Final Decision. Second, Staff raises several “operational concerns” that it sets forth in Attachment 1. Neither of Staff’s points justifies rejection of the Revised Tariff.

³ MGE’s Application for Rehearing and Motion for Clarification, p. 10, Case No. GC-2011-0100, emphasis in the original.

The Final Decision noted that paragraph 1 of the Fourth Revised Sheet No. R-34 “makes the customer liable to third persons, like an all-electric neighbor, for the Company’s negligence...That provision is unjust and unreasonable because it makes the customer liable to third persons for the Company’s conduct.”⁴ The Revised Tariff attempted to address those concerns by making it clear that the provision does not apply to any injury or damages “caused by negligence on the part of Company or its accredited personnel.” The Commission specifically stated at page 22 of its Final Decision that “The Commission concludes that immunity for negligence is not generally contrary to the public interest.” MGE has complied with the Commission’s decision by eliminating indemnity for its own negligence, and, therefore, the Commission should deny Staff’s request that Commission reject Revised Tariff.

Staff’s Recommendation notes, correctly, that the Revised Tariff has deleted the phrase “willful or gross” from the first paragraph, but asserts that remaining language still does not comply with the Final Decision, presumably because Staff reads the language as intending that the customer indemnify MGE for certain third party claims. This has never been MGE’s intent. To the contrary, MGE has always believed the language of its tariff, language that has been in effect for many years, was intended to indemnify MGE from *a customer’s claims* associated with matters that may come about as a consequence of MGE personnel performing required work on the customer’s premises, except in cases involving MGE’s negligence. MGE proposes to satisfy Staff’s apparent concern with this language by deleting the word “all” and by adding the word “customer’s” in the first line of the first paragraph of the Revised Tariff. Contemporaneously herewith, MGE is filing a substitute tariff sheet to make this wording change as shown in red-line format in the attached **Appendix 1**.

Staff’s “operational concerns” should be rejected for several reasons. First, the Commission considered and rejected those arguments when it entered its Final Decision. Staff even admits that

⁴ Final Decision, p. 25.

these concerns “were generally identified in Staff’s October 7, 2010 complaint ...”.⁵ Staff had a full and fair opportunity to see that these matters were “fully vetted” by presenting affidavits or other proof and arguments as part of its Motion for Summary Determination, but it chose not to do so. Significantly, Staff’s Recommendation expressly states that these matters are “not related to the recommendation for rejection”⁶ effectively conceding that they do not provide legitimate grounds to reject the Revised Tariff. The Commission therefore should reject Staff’s attempt to reargue its case under the guise of an attack on the Revised Tariff.

The Commission Should Deny the Motion of the Office of Public Counsel.

The Commission also should deny the Office of Public Counsel’s Motion to Suspend because the Commission already has ruled on MGE’s Tariff Sheet No. R-34, and the OPC Motion is nothing more than an attempt to re-litigate the Commission’s Final Decision. Public Counsel provides no basis for an additional hearing or further proceedings. The Revised Tariff, contrary to Public Counsel’s argument, does not immunize MGE from its own negligence.

Public Counsel’s Motion to Suspend erroneously contends that a “court of law is better able to assess the facts surrounding any incident involving loss, damage or injury to determine whether MGE had a duty to warn its customer of a hazard or potential hazard.”⁷ Courts and juries have far less knowledge and expertise concerning the proper operation of gas distribution than the Commission. Courts and juries are not in the best position to assess what type of warnings should be given to natural gas customers. The Commission is in the best position to do this, and the Pipeline Safety Regulations specify the warnings that are to be given. (See, e.g., 4 CSR 240-40.030(1)(K) concerning customer notification on specific topics mandated by 49 CFR 192; 4 CSR 240-40.030(12)(K) concerning public

⁵ Staff Recommendation, p. 1 of Attachment 1, first paragraph.

⁶ Staff Recommendation, p. 2, second paragraph.

⁷ OPC Motion, paragraph 4, p. 2.

education; and 4 CSR 240-40.030(12)(S)2 concerning providing information on specific topics to a new customer.) Additionally, the Commission is charged with the supervision of natural gas utilities in the State of Missouri. If additional warnings are needed, the regulations can be amended to specify them. Leaving it to courts and juries to specify the standards to be followed by natural gas distributors will result in wildly inconsistent standards. Further, Public Counsel's Motion to Suspend ignores case law precedent. As the Commission noted in its Final Decision, the Supreme Court of Missouri has specifically found that a tariff "may limit the immunity from ordinary negligence,"⁸ and that "immunity for negligence is not against public policy for ordinary business activities."⁹

The Other Matters Addressed By Staff And OPC Are Beyond The Scope Of The Final Decision, Seek Reconsideration Of The Final Decision Or Seek An Evidentiary Hearing On A Closed Record

Staff's Recommendation and OPC's Motion to Suspend also present matters which are irrelevant, not supported by the record in this case and, also, are beyond the scope of the question of whether the Revised Tariff complies with the Commission's findings set forth in the Final Decision. Accordingly, these claims and assertions should be disregarded.

Staff's Memorandum attached to its Recommendation includes the following statement at the end of the fourth paragraph: "MGE recovers the cost of its liability insurance in base rates." This statement is (1) irrelevant to the question of whether the Revised Tariff complies with the Final Decision and (2) beyond the scope of the record in that the allegation of fact is not supported by uncontested material facts presented in either Motion for Summary Determination. It is an unsupported allegation that has no bearing on the solitary matter now before the Commission and, consequently, should be disregarded as irrelevant.

⁸ Final Decision, p., 22, citing *Warner v. Southwestern Bell Telephone Company*, 428 S.W. 2d 596 (Mo. 1968),

⁹ Final Decision, p. 22.

The same is true of Staff's claim of numerous "operational concerns". These are not matters that were addressed in the Final Decision and they do not, therefore, provide any basis whatsoever for rejecting the Revised Tariff. These were not matters developed or properly presented by Staff in its Motion for Summary Determination. The record in the underlying case is now closed and additional matters such as "operational concerns" cannot be raised in the narrow context of a compliance filing. To bring them up now is an impermissible effort to supplement the record.¹⁰

As noted above, OPC's Motion to Suspend likewise should be summarily denied. It is nothing more than a re-hash of several matters contained in OPC's Suggestions in Support of Staff's Motion for Summary Determination.¹¹ OPC should not be permitted to urge rejection of the Revised Tariff offering nothing more than legal or policy arguments the Commission addressed and rejected in reaching its Final Decision. In practical effect, OPC's Motion to Suspend is nothing more than a Motion for Rehearing bearing a different title. The Commission denied all Motions for Rehearing on December 7, 2011. Additionally, OPC has filed a Notice of Appeal in Case No. GC-2011-0100¹² and, consequently, the Commission no longer has jurisdiction to modify its Final Decision because the matter has been (or will soon be) submitted to an appellate tribunal. See, *State ex rel. Campbell Iron Co. v. Public Service Commission*, 296 S.W. 998, 1001 (Mo. banc 1927); *State ex rel. Missouri Cable Telecommunications Ass'n., v. Public Service Commission*, 929 S.W.2d 768, 772 (Mo. App. 1996). OPC has chosen its remedy, that is, to appeal the Final Decision. It cannot have it both ways by seeking a judicial remedy and, also, attempting to induce the Commission to hold a hearing on the issues it has appealed.

¹⁰ It is worth noting that these claimed "operational concerns" have not presented any practical problems with administration in the nearly five years during which Tariff Sheet R-34 in its present form has been in effect. That Staff offers them as afterthoughts in its Recommendation in this case, is further proof that they are not worthy of consideration.

¹¹ EFIS doc. #30, File No. GC-2011-0100.

¹² EFIS doc. # 52.

Conclusion

Significantly, OPC does not contend that the Revised Tariff fails to comply with the Final Decision. Staff only contends that *the first paragraph* of the Revised Tariff is not in compliance with the Final Decision. Staff's Recommendation does not claim that any other aspect of the Revised Tariff fails to comply with the Final Decision.

As shown above, the Revised Tariff submitted by MGE fully complies with the Commission's November 9, 2011, Final Decision by making it clear that the language in the first paragraph does not apply to any injury or damages "caused by negligence on the part of Company or its accredited personnel." As such, Staff's request that the Revised Tariff be rejected should be denied.

The other matters brought up by Staff are not supported by the record in Case No. GC-2011-0100 and address matters beyond the scope of the solitary issue presented here, that is, whether the Revised Tariff complies with the Commission's findings in its Final Decision. Likewise, OPC's Motion to Suspend should be denied because its grounds for suspending the tariff are a regurgitation of general legal and policy arguments previously made to, and rejected by, the Commission. None of these are proper matters for the Commission to consider in making its determination whether the Revised Tariff complies with the Commission's Final Decision.

WHEREFORE, MGE requests that the Commission deny Staff's Recommendation and OPC's Motion to Suspend for the reasons aforesaid and to approve the Compliance Tariff as filed.

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 6th day of January, 2012.

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/s/ Paul A. Boudreau
Paul A. Boudreau

APPENDIX 1

P.S.C. MO. No. 1
 Canceling P.S.C. MO. No. 1

Fifth Revised
Fourth Revised

SHEET No. R-34
 SHEET No. R-34

Missouri Gas Energy,
 a Division of Southern Union Company

For: All Missouri Service Areas

GENERAL TERMS AND CONDITIONS FOR GAS SERVICE

3.19 COMPANY LIABILITY: Customer shall save Company harmless from all ~~customer's~~ claims for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by negligence on the part of Company or its accredited personnel.

Company may refuse or discontinue service if an inspection or test reveals leakage, escape or loss of gas on customer's premises. Provided that the Company has complied with 4 CSR 240-40.030(10)(J), 4 CSR 240-40.030(12)(S) and 4 CSR 240-40.030(14)(B), Company will not be liable for any loss, damage or injury whatsoever caused by such leakage, escape or loss of gas from customer's service line, yard line, ancillary lines, house piping, appliances or other equipment.

The Company does not own, nor is it responsible for the repair or maintenance of any piping, vents, or gas utilization equipment on the downstream side of the gas meter, its related appurtenances and piping. All piping, vents or gas utilization equipment furnished by the owner/customer of the premises being served shall be suitable for the purposes hereof and the owner/customer of the premises shall be responsible for the repair and maintenance of such at all times in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company. As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware of this fact, and Company shall owe customer no duty to warn of potential hazards that may exist with such facilities on the downstream side of the gas meter, its related appurtenances and piping, provided that the Company has complied with 4 CSR 240-40.030(10)(J), 4 CSR 240-40.030(12)(S) and 4 CSR 240-40.030(14)(B).

The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

Provided that the Company has complied with 4 CSR 240-40.030(10)(J), 4 CSR 240-40.030(12)(S) and 4 CSR 240-40.030(14)(B), the Company shall not be liable for loss, damage or injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the downstream side of the gas meter, which shall include but not be limited to any and all such loss, damage or injury involving piping, vents or gas utilization equipment not owned by the Company downstream of the gas meter, whether inspected or not by the Company, or occasioned by interruption, failure to commence delivery, or failure of service or delay in commencing service due to accident to or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or, without limitation by the preceding enumeration, any other act or things due to causes beyond Company's control, or attributable to the negligence of the Company, its employees, contractors or agents, provided that the Company has complied with 4 CSR 240-40.030(10)(J), 4 CSR 240-40.030(12)(S) and 4 CSR 240-40.030(14)(B).

DATE OF ISSUE _____
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DATE EFFECTIVE _____
 month day year

ISSUED BY Michael R. Noack

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